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In The

Supreme Court of the United States

October Term, 1995

DOUGLAS W. LUZIK, ET AL.,

Petitioners,

vs.

COMMONWEALTH OF VIRGINIA, ET AL.

Respondents.

Petition for a Writ of Certiorari to the Virginia Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Department of Labor rule that employees are not exempt under the Fair Labor Standards Act salary basis test when they are subject to disciplinary deductions in pay of less than one week for non-safety related infractions or for appearance as a witness, regardless of whether any actual deductions have occurred, control public sector FLSA exemption claims?

2. Does the Department of Labor rule that employees are not exempt "administrators" under the Fair Labor Standards Act when they are engaged in work which is the day-to-day product of their employer, as opposed to work directly related to the running of the business, control public sector FLSA exemption claims?

3. Does the Department of Labor rule that employees are not exempt "professionals" under the Fair Labor Standards Act without the designation of any specific profession and without a degree requirement control FLSA public sector exemption claims?

PARTIES TO THE PROCEEDINGS

The Plaintiffs in the trial court include Douglas Luzik, a juvenile probation officer for the Commonwealth of Virginia, and 102 similarly situated employees, who are listed in the footnote which follows.[1] All of the Plaintiffs were Appellants before the Virginia Supreme Court, except Andrea Scott who has requested to withdraw from the appellate proceedings. This petition is brought on behalf of 102 juvenile probation officers. The Defendants and Appellees include the Commonwealth of Virginia, and Patricia West, in her official capacity as the Director of the Department of Youth and Family Services.

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Douglas Luzik, *et al.*, the Plaintiffs in the Richmond Circuit Court and the Appellants in the Virginia Supreme Court, petition for a writ of *certiorari* to review the judgment of the Richmond Circuit Court in *Luzik v. Virginia*, No. HC-1303 (Rich. Cir. Ct. May 5, 1995).

OPINIONS BELOW

The Petitioners filed a petition for appeal with the Virginia Supreme Court on August 4, 1995. The Virginia Supreme Court refused the petition in an unpublished decision on December 20, 1995, finding no reversible error. *Luzik v. Virginia*, No. 951430 (Va. Dec. 20, 1995). The court's final order refusing the petition is reproduced as Appendix A in the Appendix to this *certiorari* petition (hereinafter "App."). (App. 1a).

The trial court decision, *Luzik v. Virginia*, No. HC-1303 (Rich. Cir. Ct. May 5, 1995), is unreported and is reproduced as Appendix B. (App. 2a-17a).

STATEMENT OF JURISDICTION

The Virginia Supreme Court's denial of discretionary review of the lower state court decision was entered on December 20, 1995. This petition was filed within 90 days of that date. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257. No petitions for rehearing were filed. The issues for review involve the interpretation of a federal statute.

STATUTORY PROVISIONS INVOLVED

Section 213(a)(1) covering exemptions from the Fair Labor Standards Act (hereinafter "FLSA"), 29 U.S.C. § 213(a)(1), is reproduced as Appendix C. (App. 18a).

The Secretary of Labor's FLSA regulations set out at 29 C.F.R. § 541.2 (the administrative exemption rule); § 541.3 (the professional exemption rule); § 541.118 (the salary basis rule); § 541.118(a)(5) (the non-safety related disciplinary pay docking rule), and § 541.5d (the special salary basis rule applicable to employees of public agencies) are reproduced as Appendix C. (App. 18a-26a).[2] The Department of Labor ("DOL") Final Rule in 29 C.F.R. § 541.5d was published with the DOL's comments on the salary basis test in the public sector and the disciplinary docking rule in 57 Fed. Reg. 37666 (August 19, 1992) and is reproduced in Appendix C. (App. 27a-62a).

STATEMENT OF THE CASE

The FLSA requires employers to pay their employees time and one half pay for every hour worked over forty hours in a work week. The Act provides for a "white collar" exemption for

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2. This Court designates as "legislative regulations" those regulations that are issued pursuant to "an express delegation of authority to [an] agency to elucidate a specific provision of [a] statute by regulations." *Chevron USA Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 843-44 (1984).

The FLSA contains in 29 U.S.C. § 213(a)(1) such an express delegation to the Department of Labor to define "executive, professional and administrative employees". The regulations set forth in 29 C.F.R. § 541.2-3 and § 541.5d are clearly such legislative regulations. 29 C.F.R. Part 541A of the FLSA exemption regulations are headed "General Regulations" and are generally designated the "legislative" regulations under the Act; DOL's "interpretations" of the "general" or "legislative" regulations in 29 C.F.R. Part 541A are set forth in 29 C.F.R. Part 541B. The discussion of the "salary basis" test in § 541.118 is contained in the Code of Federal Regulations within those sections of Part 541B headed "interpretations." However, unlike some of the 541B interpretations, § 541.118 is expressly incorporated into the "legislative" regulations of 541A through § 541.5d which limits reliance on its public sector modification of the salary basis pay docking rules to a "Federal, State or local government employee who otherwise meets the requirements of § 541.118."

executive, administrative and professional employees "as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor]." *See* 29 U.S.C. § 213(a)(1). (App. 18a). The Secretary has promulgated such regulations which establish a two pronged test to determine exempt status: a salary basis test and a duties test. The employer has the burden of establishing that an employee fulfills both tests prior to exempting the employee from the FLSA's minimum wage and overtime rules. *See* 29 C.F.R. § 541.2 and § 541.3. (App. 18a-22a).[3]

A special rule with regard to the application of the salary test to public employees allows exempt public employees to be subject to part-day docking for absences for personal reasons of less than one day *but* disallows rules making public employees subject to non-safety related disciplinary pay docking in an FLSA pay period. *See* 29 C.F.R. § 541.5d and § 541.118(a)(5) and 57 Fed. Reg. 37673-74. (App. 24a-27a; 47a-48a; 53a-57a).[4]

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3. The basic two test approach has been in place since 1940. 5 Fed. Reg. 4077 (1940), §§ 541.1(e), 2(a) and 3(b). In 1949, the DOL amended the regulations. Since that time the salary basis test has been nearly identical to 29 C.F.R. § 541.118(a). *See* 29 Fed. Reg. 7730, 7735 (1949). In 1954, DOL further elaborated the salary test. *See* 19 Fed. Reg. 4405, 4406 (1954). Finally, effective September 18, 1991, the salary basis test was amended by adding § 541.5d with regard to public employees to provide that so long as a public employee otherwise meets the salary basis requirements of § 541.118, the employee would not be disqualified as exempt on the basis that the employee's pay is subject to docking for part day absences. *See* 56 Fed. Reg. 45824 and 45828 and 57 Fed. Reg. 37666.

4. The DOL's publication of the final revised rule now in § 541.5d discussed commenters' suggestions that § 541.118(a)(5) be repealed to allow non-safety related disciplinary deductions from public employees' pay. The DOL considered and rejected the suggestions. The final revisions left the salary basis test in place in the public sector, although modified from the private sector rule, to allow pay docking for part day absences. The provision

(Cont'd)

The Secretary has delimited the "administrative" exemption to those employees whose primary duty involves discretionary administrative duties relating directly to internal management and the "professional" exemption to those employees who are primarily engaged in work for which a "prolonged course of specialized intellectual instruction and study as distinguished from a general academic education" is required. 29 C.F.R. § 541.2 and § 541.3 (App. 18a-22a).

All of the Petitioners are juvenile probation officers for the Commonwealth of Virginia. Each is engaged in substantially similar work. The Commonwealth classified each Petitioner as exempt from overtime under the FLSA under the administrative exemption. A few weeks prior to the trial in this case, the Commonwealth claimed, for the first time, that the Petitioners are also exempt under the professional exemption. As a result, the Commonwealth does not pay Petitioners for overtime pay when they work more than 40 hours in a work week. Each Petitioner is "subject to" a disciplinary reduction in pay of less than one work week for a non-safety related infraction. (App. 7a). The Petitioners are engaged in the day to day work product of the Youth and Family Services Department. The Commonwealth has no degree requirement and does not require a "prolonged course of specialized intellectual instruction and study as distinguished from a general academic education" for the position of juvenile probation officer. (App. 10a-12a).

On July 1, 1992, Petitioner Douglas Luzik, on behalf of himself and fifteen similarly situated juvenile probation officers filed a Bill of Complaint in the Circuit Court for the City of Alexandria, Virginia raising federal questions concerning the

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(Cont'd)
against non-safety disciplinary deductions in any work period in which the public employee had FLSA work time was preserved. (App. 43a, 47a-48a; 53a-57a).

Commonwealth's violations of the FLSA overtime provisions. On November 25, 1992, the case was transferred to the Circuit Court for the City of Richmond.[5]

Petitioners challenged the Commonwealth's treatment of them as FLSA exempt employees asserting that (1) all of the Petitioners were hourly, and not salaried, employees, and therefore could not be exempt from the FLSA, (2) all of the Petitioners engage in work which is the product of the unit, and therefore, are not exempt administrators, and (3) the Commonwealth has no degree requirement, nor are juvenile probation officers a profession as defined by the FLSA, and therefore, the Petitioners are not exempt professionals.

The trial was bifurcated between issues of liability and damages. On November 21, and 23, 1994, the trial on the liability stage of the case was presented to Judge T.J. Markow of the Richmond Circuit Court without a jury. On May 5, 1995, Judge Markow rendered his decision concluding that (1) the juvenile probation officers were FLSA salaried employees, despite his finding that they were subject to reductions in pay of less than a week for non-safety disciplinary purposes or for appearance as a witness at trial (App. 5a-7a); (2) the juvenile probation officers were FLSA administrative employees because their work is of such "substantial importance" to the courts (App.8a-10a); and (3) the juvenile probation officers were also exempt from the FLSA under the professional exemption even though there is no degree requirement and no recognized profession of juvenile probation officers because their work is "predominantly intellectual and varied in character." (App. 10a-12a).

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5. The Fair Labor Standards Act expressly provides that "an action to recover . . . may be maintained against any employer (including a public agency) in any Federal or State Court of competent jurisdiction . . ." 29 U.S.C. § 216(b).

On August 4, 1994, Petitioners timely filed a petition for appeal with the Virginia Supreme Court, the Commonwealth's Court of last resort. On December 20, 1995, the Virginia Supreme Court refused the petition for appeal stating "[u]pon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal." (App. 1a).

This petition for certiorari involves three areas. First, it questions the trial court's assertion that the Department of Labor's 1991 regulatory amendments indicate that "absent a showing that a reduction actually occurred, [existance of a policy] does not destroy salaried status." Slip op. at 4 (App. 6a). The trial court found that "the Commonwealth had a disciplinary rule in place that 'subjected' the juvenile probation officers to a potential pay reduction"; however, it concluded that did "not destroy their salaried status absent evidence that a reduction actually occurred." Slip op. at 4 (App. 7a).

Second, this petition questions the trial court's holding that the Petitioners sought a too narrow reading of the regulations as to the administrative test. It refused to consider whether the primary duty of the juvenile probation officers involved internal management of the unit or the production of the unit in considering whether the employees were exempt under the administrative exemption. Slip op. at 5 (App. 9a). The trial court rejected a Ninth Circuit federal Court of Appeals decision, in *Bratt v. County of Los Angeles*, 912 F.2d 1066 (9th Cir. 1990) *cert. denied*, 498 U.S. 1086 (1991), exactly on point as well as several DOL letter rulings. (App. 10a). Instead it claimed that the employees were "administrative" employees because their work "is substantially important" to the courts. Slip op. at 5 (App. 9a).

Finally, the trial court found that some juvenile probation officers do not hold college degrees and that as much as 22% of those who do have college degrees, do not hold them in a related field of social science. The court declared, without any support in the regulations or from another court, that the FLSA does not have a degree requirement. Additionally, it did not make any ruling that juvenile probation officers are engaged in work generally recognized as a profession. Nevertheless, the trial court erroneously concluded the Petitioners are also exempt under the FLSA professional exemption.

The trial court's decision, by its own declaration, is at odds with federal Courts of Appeals rulings. The court itself noted a split in the Circuits regarding the salary basis test. It also created a split between the law applied in the federal courts and in the Virginia state courts by rejecting outright federal precedent directly on point.

The ruling is further at odds with the "legislative" regulations of the DOL which are entitled to special deference. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984). It is at odds with the DOL's interpretation of its own regulations which are specifically tailored to public employees which makes the interpretations "persuasive evidence that the interpretation is one intended by Congress." *See NLRB v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 274-75 (1974).

Finally, it is at odds with congressional intent as Congress specifically considered FLSA amendments which would have changed the salary basis test in the public sector and refused to do so. *See* S. 1670, 102d Cong. 1st Sess. (Aug. 2, 1991); S. 3089, 102d Cong. 2d Sess. (July 28, 1992); and H.R. 5112, 102d Cong. 2d Sess. (May 1992); *See also, Chevron, supra.*

Questions concerning the application of the DOL's salary basis regulations in the public sector are currently pending before this Court in two other petitions, each of which emphasizes the fact that this controversy raises an important issue of federal law and is the topic of a severe and confused conflict among the Circuits and the state courts. *Mueller v. Reich*, 54 F.3d 438 (7th Cir. 1995), *cert. pending*, No. 95-586 (1995) (United States submitted a brief as a party); *Auer v. Robbins*, 65 F.3d 702 (8th Cir. 1995), *cert. pending*, No. 95-897 (1995) (court requested United States submit a brief identifying United States' position).

REASONS FOR GRANTING THE WRIT

The decision below adopts a broad reading of FLSA exemptions, thereby (1) intensifying a severe and confusing split among the circuits and states; and (2) erroneously applying federal law.

This Court has emphasized that the "breadth of coverage" of the FLSA's overtime hours rules is "vital to [its] mission" of establishing a national work week standards and that statutory exemptions to the Act should be narrowly construed. *Powell v. United States Cartridge Co.*, 399 U.S. 497, 516 (1950); *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959). The presumption is that an employee is *not* exempt. The employer carries the burden to prove the applicability of each exemption by "clear and affirmative evidence" that each employee for whom an exemption is claimed is entitled to a bona fide exemption under the DOL's regulations. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974). DOL regulated "[e]xemptions are to be narrowly construed and limited to those unmistakenly and plainly within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960).

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A SEVERE AND CONFUSING SPLIT EXISTS AMONG THE FEDERAL CIRCUIT COURTS OF APPEAL AND THE STATE COURTS.

A. The Salary Basis Disciplinary Docking Rule Split.

The regulations state that a public employee is a salaried employee if the employee regularly receives a predetermined amount which "is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.118(a) (App. 23a). The regulations continue to explain that the salary basis is destroyed if deductions are made for absences caused by attendance as a witness, or for disciplinary deductions in pay of less than a pay period for non-safety related infractions. 29 C.F.R. §§ 541.118(a)(4) and (5) (App. 24a). A severe and confusing split among the courts has developed between whether an employee loses salaried status when the employer has a rule subjecting employees to discipline of a loss of pay for part of a work period for non-safety reasons or only when the employer has actually disciplined an employee with the loss of pay for less than a work period for non-safety reasons.

The courts themselves have noted a split in judicial interpretation of this provision. "[T]he application of [the FLSA salary test docking rules] in 29 C.F.R. § 541.118(a) to governmental employees has given rise to a sharp split, both between judges in this circuit and between circuits." *Kinney v. District of Columbia*, 994 F.2d 6, 11 (D.C. Cir. 1993) (J. Silberman writing for himself, Judge Wald and Judge Ginsberg). Judge Silberman pointed out a split among district court opinions within the District of Columbia *comparing Harris v. District of Columbia*, 709 F. Supp. 238, 241 (D.D.C. 1989) (requiring a showing of actual deductions) and *District of Columbia Nurses' Ass'n v. District of Columbia*, 1988 U.S. Dist.

Lexis 16500 (D.D.C. 1988) (also requiring actual deductions) *with D'Camera v. District of Columbia*, 693 F. Supp. 1208, 1212 (D.D.C. 1988) (applying simply a "subject to" discipline rule).

More importantly, Judge Silberman pointed out a triple division among Circuits *comparing Atlantic Firefighters v. City of Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991) (requiring actual deductions) to *Michigan Ass'n of Government Employees v. Michigan Department of Corrections*, 992 F.2d 82 (6th Cir. 1993) (requiring actual deductions when a deduction policy is ambiguous but not otherwise) *to Abshire v. County of Kern*, 908 F.2d 483, 487 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991) (applying only a "subject to" rule); and *comparing Abshire* and *Brock v. Claridge Hotel and Casino*, 846 F.2d 180, 184-85 (3d Cir. 1987), *cert. denied*, 488 U.S. 925 (1988) (finding that recording and compensating for overtime inconsistent with the salary basis test) *with Hartman v. Arlington County*, 720 F. Supp. 1227, 1229 (E.D. Va. 1989), *aff'd*, 903 F.2d 290 (4th Cir. 1990) (finding that recording and compensating for overtime not inconsistent with the test).

In *Kinney*, the D.C. Court of Appeals found divisions between the Ninth and the Eleventh Circuits, with additional complications from the Third, Fourth and Sixth Circuits. The D.C. Circuit joined with the Ninth and avoided the issues raised in the Third, Fourth and Sixth Circuits.

One month after Judge Silberman's dissection, Eighth Circuit Judge Gibson struggled further with § 541.118(a) and, in *McDonnell v. Omaha*, 999 F.2d 293, 297 (8th Cir. 1993) noted an even wider split, pitting the Second, D.C., Sixth, Seventh and Ninth Circuits against the Fifth and Eleventh Circuits. The Eighth Circuit in *McDonnell* joined the Fifth and Eleventh Circuits.

Two years later, in May 1995, Fifth Circuit Judge Reavey, sitting by designation, wrote for the Tenth Circuit in *Aaron v. City of Wichita*, 54 F.3d 662 (10th Cir. 1995) noting the same divergence — this time among the Second, D.C. and Ninth Circuits, on one hand, and the Fifth, Eighth and Eleventh Circuits, on the other. The Tenth Circuit avoided choosing sides, ruling that the City of Wichita had neither an express mandatory docking rule nor a practice of actual docking, but leaned toward the Sixth Circuit's "actual docking" rule.

In the case below, Richmond Circuit Court Judge, T. J. Markow, similarly noted the split among the federal Circuits. "Circuits are split as to the treatment of this issue." Slip op. 4 (App.6a). Judge Markow noted that some circuits hold the mere existence of such a policy destroys salaried status while others say it does not absent evidence of an actual deduction. Table A, originally filed in the petition for *certiorari* in Case No. 95-897, further illustrates the breadth of this severe, confusing and growing split among the courts concerning the salary basis test and the disciplinary docking rule. (Exhibit attached to this petition).

B. The Juvenile Probation Officer Administrative Exemption Split.

Judge Markow's decision has created a split of authority as to whether juvenile probation officers are FLSA administrative employees. Petitioners are aware of no other case which holds that juvenile probation officers are administrative employees. On the other hand, the federal Ninth Circuit Court of Appeals considered this precise issue and concluded that juvenile probation employees are not exempt administrative employees because they are engaged in the day-to-day production work of the unit. *Bratt v. County of Los Angeles*, 912 F.2d 1066, 1070 (9th Cir. 1990), *cert. denied*, 498 U.S. 1086 (1991).

The federal Fourth Circuit Court of Appeals (which includes Virginia) has cited *Bratt* with approval. *Shockley v. Newport News*, 997 F.2d 18, 29 (4th Cir. 1993). The Fourth Circuit adopted the *Bratt* test and held that police sergeants are not exempt administrators because their work is the product of the unit and "not work related to the administrative operations of the police department." *Id.*

In addition to these federal courts of appeal, the highest court in the District of Columbia similarly ruled that juvenile probation officers are not exempt administrators because they are engaged in the day-to-day production work of the unit. *Jones and Assoc. v. District of Columbia*, 642 A.2d 130, 134 (D.C. App. 1994). Each of these decisions are consistent with the DOL's letter rulings on the same issue. *See* DOL Letter Rulings, February 16, 1988 (App. 63a-66a); April 12, 1988 (App. 66a-69a); May 9, 1988 (App. 70a-73a).

Without citing any authority to the contrary, however, Judge Markow simply stated that he rejected the DOL Letter Rulings and the *Bratt* holding. Slip op. 5 (App. 10a). In refusing to accept these authorities, Judge Markow asserted that such interpretations required a "too narrow" reading of the regulations.[6] Slip op. 5 (App. 9a). Such a blanket refusal to apply the regulations as the DOL and other courts have, has created the untenable position that the FLSA law for Virginia public employees is different than the FLSA law for public employees in the Ninth Circuit and the District of Columbia as well as for employees before the DOL — the administrative agency charged with enforcing the Act.

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6. Despite Judge Markow's resistance, this Court requires a narrow reading of the FLSA regulatory exemptions. *See Powell v. United States Cartridge Co.*, 399 U.S. 497, 516 (1950); *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959); *Arnold v. Ben Kanowsky Inc.*, 361 U.S. 388, 392 (1960).

Most significantly, Judge Markow's ruling has created a split within Virginia itself. Employees who bring FLSA claims in Virginia federal courts are governed by the Fourth Circuit's *Shockley* mandate that employees, like Petitioners, who are engaged in the day-to-day production work of the unit are not administrative exempt employees. If, however, those very same employees bring suit in Virginia state courts, they are governed by Judge Markow's ruling rejecting *Shockley*, *Bratt*, and *Jones and Associates*, and they will be found to be exempt under the FLSA.

C. The Professional Exemption Split In The Courts.

Judge Markow is the first judge to ever rule that being a juvenile probation officer in a position which does not require *any* college degree is a profession as defined by the Fair Labor Standards Act.[7] The federal Eleventh Circuit Court of Appeals considered this issue and ruled that the determinative factor for establishing an FLSA professional exemption is "the job requirement and not the education in fact acquired by the employee." *Dybach v. Florida Dept. of Corrections*, 942 F.2d 1562, 1565 (11th Cir. 1991). The Eleventh Circuit concluded that when the Department only had a general college degree requirement coupled with a requirement for just one year's experience, it did "not rise to the level [of training and education] called for by" the FLSA. *Id.* at 1566. Similarly, the federal District Court for Maine held that "[t]he [professional] exemption is keyed to what the work *requires* and not to the hiring preferences various interviewers may practice in making

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7. The Alabama State Court of Appeals has found juvenile probation officers to be FLSA professionals; however, this finding was only after the court concluded that the position required a *masters degree* in sociology or a closely related field *and* one year of responsible successful social case work experience. *Mosely v. James T. Strickland Youth Center*, 1994 Ala. Civ. App. LEXIS 480, 2 WH Cases 2d 606 (Ala Civ. App. 1994).

individual employment selection." *Mills v. Maine*, 839 F. Supp. 3, 5 (D. Maine 1993) (emphasis in original). *See also, McIntyre v. Youth Rehabilitation Services*, 795 F. Supp. 668 (D. Del. 1993) (treating juvenile field investigators as non-exempt).

Despite these federal court rulings, Judge Markow held that a "written policy requiring a degree is not a prerequisite for the exemption." Slip op. 7 (App. 11a). He implied there could be a *de facto* policy if the hiring officials had a preference for candidates with degrees. He went on to find that some juvenile probation officers did not have *any* college degree and that as many as 22% of those with degrees did not hold those degrees in a related field. He did not find that there was any special requirement for any specific professional experience which would compensate for the lack of a degree, as would be the case for an attorney who reads for the bar. He did not find that juvenile probation officers were readily accepted in the community as a profession. Nevertheless, he held that the Commonwealth had met its burden to prove that juvenile probation officers were exempt professionals. Slip op. 8 (App. 12a).

This conclusion has caused a significant split in the courts. In Virginia, a juvenile probation officer whose job has no degree requirement, no experience requirement, and where there is no commonly recognized profession of juvenile probation officers, is an exempt professional. In the Eleventh Circuit, Maine, Alabama and Delaware, such a juvenile probation officer is not exempt. In fact, in those jurisdictions except Virginia, juvenile probation officers whose positions have even the stricter requirements of a general college degree and some experience are still not exempt from FLSA coverage.

II

THE DECISION BELOW CONTAINS ERRONEOUS INTERPRETATIONS OF IMPORTANT QUESTIONS OF FEDERAL LAW.

The Richmond Circuit Court decision below is not only in conflict with federal circuits, it is also incorrect. The trial court reached a decision which contradicts the reasonable interpretation adopted by the DOL of its own regulations. Under this Court's mandate in *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984), the court below erred when it refused to follow the DOL's interpretation of its regulations on the salary basis test's "disciplinary docking" rule, its interpretation of the administrative exemption's "day-to-day production work" rule, and its interpretation of the professional exemption's "intellectual instruction and study" rule. The DOL's reasonable construction is due deference and is controlling, even if the court below's own construction is equally reasonable. However, in this case, the court below repeatedly refused to follow the weight of authority including the DOL interpretations and refused to adhere to a narrow interpretation of the FLSA exemptions. The Richmond Circuit Court's interpretation therefore, is not even reasonable.

A. Disciplinary Docking: Subject to v. Actual.

According to the court below, "the fact the Commonwealth had a disciplinary rule in place that 'subjected' the juvenile probation officers to a potential pay reduction does not destroy their salaried status absent evidence that a reduction actually occurred." Slip op. 4 (App. 7a). As discussed above, this "actual deduction" standard is the minority rule followed only by the

Fifth[8], Eighth[9] and Eleventh[10] Circuits. The Second[11], D.C.[12], Fourth[13], Sixth[14], Seventh[15] and Ninth[16] Circuits have adopted a rule that an employer's policies making an employee's compensation "subject to" deduction, and not actual deductions (which, of course, would only occur in cases of disciplinary infraction), is determinative of whether purportedly exempt employees are paid on a salary basis. This stricter "subject to" rule is clearly used by the Department of Labor. *See* Lawrence Peikes, "Tightening the White Collar Exemptions — The Court Breaths New Life into the Fair Labor Standards Act," 10 *The Labor Lawyer* 121 at 125-136 (1994). The specific "subject to deduction" language contained in § 541.118(a) establishes that it is sufficient that an employee works under rules which provide that the employee's compensation could be reduced by a

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8. *York v. Wichita Falls*, 994 F.2d 236 (5th Cir. 1991).

9. *Auer v. Robbins*, 65 F.3d 702 (8th Cir. 1995).

10. *Atlanta Professional Firefighters v. Atlanta*, 920 F.2d 800 (11th Cir. 1994).

11. *Martin v. Malcom Pernie*, 949 F.2d 611, 615 (2nd Cir. 1991), *cert. denied*, 113 S. Ct. 298 (1992).

12. *Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993).

13. *Shockley v. Newport News*, 997 F.2d 236 (4th Cir. 1991).

14. *Michigan Ass'n of Gov't Employees v. Dept. of Corrections*, 992 F.2d 82 (6th Cir. 1993).

15. *Klien v. Rush-Presbyterian*, 990 F.2d 279, 289 (7th Cir. 1993).

16. *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991).

suspension without pay for less than a full pay period. The Sixth Circuit has outlined the practical reasons for the rule —

> We choose to focus on the actual policy, rather than whether the policy has ever been administered for two reasons. First, this approach is more consistent with the regulatory language defining a salaried employee as one who is paid "a predetermined amount which is not *subject to* reduction because of variations in the quality or quantity of his work." Also, this approach is more consistent with the general notion of a salaried employee; as the *Abshire* court stated "either pay is fixed and immutable, and not subject to deductions, or it is contingent." Second, focusing on the actual policy is more practical and realistic. Employees subject to reduction in pay will, of course, attempt to avoid these deductions by juggling schedules and sacrificing non-work opportunities. Simply because a reduction in pay has never been applied does not mean that the employee has not been affected by the policy subjecting the employee to pay reduction.

Michigan Ass'n of Government Employees v. Michigan Dep't of Corrections, 992 F.2d 82, 86 (6th Cir. 1993). Entitling only those employees who actually suffer disciplinary deductions to overtime pay, while keeping it from those "subject to" discipline but not deserving of it, would have the odd consequence of granting overtime pay protection only to those who engage in conduct for which they may be disciplined while keeping overtime pay protection from those who comply with the employer's rules and regulations.

There is no confusion about the position of the Department of Labor on this point. In its August 19, 1992, publication of the final rule currently controlling public sector exemptions 29 C.F.R. § 541.5d (incorporating by reference § 541.118(a)(5)'s disciplinary docking rule), the Department of Labor specifically responded to a comment on the regulations from the City of Chicago which suggested that the new rule on improper deductions be patterned "so that the exemption would be lost only in the weeks in which deduction(s) occur" —

> The Department considers the suggested change to be a significant departure from long-standing policy that is not substantiated by the comment. Nor has any basis been presented to give special treatment in this regard to the public sector. It has, therefore, not been adopted in the final rule.

57 Fed. Reg. 37675 (August 19, 1992) (App. 56a-57a). *See also*, the comments on the preservation of the public sector salary test and the disciplinary deduction rule, 57 Fed. Reg. 37674 (August 19, 1992). (App. C).

In this regard, Judge Markow was simply incorrect in his holding that the DOL 1991 amendments recognized the financial strain on public employers who are accountable to taxpayers in reference to § 541.118(a)(5). Judge Markow rejected the "subject to" rule because "[t]o hold otherwise would fiscally devastate the Commonwealth." (App. 7a). However, the DOL specifically retained § 541.118(a)(5)'s disciplinary docking rule, despite its recognition of public accountability in amending § 118(a)(1)-(3)'s part-day docking in 1991. (App. 43a, 47a-48a, 53a-56a). "Only partial-day deductions from pay when leave was not used or was exhausted and furlough-required deductions were addressed by the interim final rule. All other aspects of the

salary test were left *unchanged for the public sector*." 57 Fed. Reg. 37666 (App. 48a) (emphasis added). Moreover, as Judge Posner pointed out in *Mueller v. Reich*, 54 F.3d 438, 442 (7th Cir. 1995), *cert. pending*, Case No. 95-586, "[n]either the principle of public accountability, nor any other principle of public administration . . . makes it imperative that public employers have th[e] power" to impose disciplinary suspensions on their exempt employees. To avoid having such employees be found exempt, "all the states have to do is to delete this form of discipline from their arsenals of disciplinary remedies." *Id.* at 443. The Richmond Circuit Court's interpretation of "subject to" disciplinary deductions cannot be reconciled with the clear interpretations of the DOL.

B. Administrative Exemption: Day-To-Day Production Work.

To be exempt under the administrative exemption, an employee must "have as his [or her] primary duty office or nonmanual work directly related to management polices or general business operations of his employer . . ." 29 C.F.R. § 541.206. The Department of Labor has interpreted the phrase engaged in work "directly related to management policies or general business operations" to exclude juvenile probation officers.

> In determining whether activities are "directly related to management polices or general business operations" of the employer, it is important to consider the nature of the "business" itself, or in this case, the function of the government agency in question. Inasmuch as the Department has as one of its functions the providing of probation services, the probations activities performed by the [juvenile probation

> officers] would appear to be related more to the ongoing day-to-day "production" operations of the Department than to management policies or "general business operations."

DOL Letter Ruling of February 16, 1988 (App. 65a). *See also*, Letter Rulings of April 12, 1988 and May 9, 1988. (App. 66a-73a).

The Ninth Circuit's *Bratt* holding followed the DOL's interpretation when it concluded "the services the [juvenile probation] employees provide the courts do not relate to court policy or overall operational management but to the courts' day-to-day production process." *Bratt*, 912 F.2d at 1070. The District of Columbia's highest court similarly ruled "to the extent that probation activities can be analogized to a business, the work of the [probation officers] primarily involves the day-to-day carrying out of the business affairs, rather than running the business itself or determining its overall course or policies." *Jones and Assoc.*, 642 A.2d at 134 (D.C. App. 1994).

The Richmond Circuit Court rejected this analysis and looked, instead, only to whether the work performed was important to the courts. The court rebuffed any analysis of whether the employees were engaged in the day-to-day production work of the unit as opposed to the running of the business. Judge Markow said such an analysis is a "too narrow" reading of the regulations. Slip op. at 5 (App. 9a). His holding profoundly contradicts the DOL's own longstanding interpretation of the administrative exemption as it applies specifically to juvenile probation officers. As such, it is an erroneous interpretation of an important question of federal law. *See Chevron*, 467 U.S. at 865-66; *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974).

C. The Professional Exemption Prolonged Course of Specialized Intellectual Instruction and Study.

For an employer to meet its burden with regard to the professional exemption, the employer must establish that the employee is engaged in work for which a "prolonged course of specialized intellectual instruction and study as distinguished from a general academic education" is required. 29 C.F.R. § 541.302. The Department of Labor has interpreted these regulations to mean that when a general academic degree is normally required, but some employees are hired based upon their training and experience, and not the degree, the employer cannot meet its burden to show the employee fits within the professional exemption.

> The term "professional" is limited to those professions which have a recognized status and which are based on the acquisition of professional knowledge acquired through prolonged intellectual instruction and study. The typical symbol of professional training and the best *prima facie* evidence of its possession is the appropriate academic degree, and *in the professions a baccalaureate degree is a standard prerequisite.*

DOL Letter Ruling May 9, 1988 (App. 71a) (emphasis added).

Every decision in federal or state court to review whether juvenile probation officers are professionals have followed the DOL's interpretation of its regulations, except the decision below. As indicated above, the Eleventh Circuit held "[w]ithout in any way demeaning the role of a probation officer with a college degree based solely on a generalized education, such

training and education do not rise to the level called for by Section 213(a)(1) and the regulations issued by the Secretary pertaining to it." *Dybach*, 942 F.2d at 1566. The Alabama State Court of Appeals also followed the DOL's interpretation when it held that the officers were professionals only after concluding that the job *required* a masters degree and a successful year of social work experience. The federal district court in Maine similarly rejected the employer's claim that the officers were exempt professionals when the job required

> simply a baccalaureate degree in one of the social sciences or a closely related field. That is hardly a course of specialized intellectual instruction and study but instead a general academic education. . . . Although state probation officers do important work that is critical to the administration of Maine's system of justice and although they are expected to behave in a "professional" capacity in the sense that the word is popularly used, their work does not fit the definition of the exemption under the regulations and the statute.

Mills v. Maine, 839 F. Supp. at 5.

In this case, the court incorrectly concluded as a matter of law that the Commonwealth met its burden to prove that the Petitioners fit "plainly and unmistakenly" within the professional exemption in spite of its factual findings that some juvenile probation officers had no college degree and as many as 22% had degrees in wholly unrelated fields. Slip op. 8 (App. 12a). The decision below is the antithesis to the DOL's own interpretation of its regulations and every other court to rule on the issue. The DOL states that "in the professions a baccalaureate

degree is a standard prerequisite," yet Judge Markow held that a degree requirement "is not a prerequisite for the exemption." Slip op. 7 (App. 11a).

Judge Markow's holding creates a new FLSA profession of juvenile probation officers without any requirement that the employees have any college degree or specialized training and without any common recognition of such a profession. The decision flies in the face of this Court's mandate to construe exemptions narrowly. It broadens the boundaries for professional exemptions. Employers, using Judge Markow's decision and rationale, will believe that a great many "inside work" positions for which no education or specialized training is required are exempt professions.

"[A] court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974). Due deference to the agency responsible for FLSA enforcement requires that Judge Markow's holdings do not replace the DOL's reasonable and longstanding interpretations of its own rules. *See also, Chevron*, 467 U.S. at 865-66.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant this petition for a writ of *certiorari*.

Respectfully submitted,

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EXHIBITS ANNEXED TO FOREGOING PETITION

TABLE A: FLSA SALARY TEST CONFLICTS IN CIRCUITS

Circuit		1st	2nd	3rd	DC	4th	5th	6th	7th	8th	9th	10th	11th	DOL
FLSA Salary Basis Test & "Subject To" Discipline 29 C.F.R. Sec. 541.5d and 541.118(a)(5)														
Express Indication of Conflict		—	—	—	YES #4	—	—	—	—	YES #18	—	YES #24	—	-
Salary Test In Public Sector		—	YES #1	—	YES #3 #4	YES #5 #6 #7 #8	YES #9	YES #10 #11	YES #15 #16	YES #17 #18	NO #22 YES #19 #20 #21	YES #23 #24	YES #25 #26	YES
Subject to Deduct Enough		—	YES #1 #2	—	YES #4	YES #6 #7	?	YES #10	YES #14 #15 #16	NO #17 #18	YES #19 #21	NO #23 #24	NO #25 #26	YES
Actual Deduct Needed		—	NO #1 #2	—	NO #4	NO #6 #7	?	NO #10	NO #14 #15 #16	YES #17 #18	NO #19 #21	YES #23 #24	YES #25 #26	NO
Actual Deduct Resolves Ambiguity		—	—	—	—	—	—	YES #10 #11	—	—	YES #20	YES #23 #24	—	YES
Leave Deduct Enough		—	YES #2	—	—	—	NO #9	—	—	NO #18	? #19 #20	NO #24	—	NO
Anti-discipline Rule Applied		—	YES #1	—	YES #4	YES #6 #7 #8	—	—	YES #14 #15	YES #17 #18	YES #19	—	YES #26	YES

TABLE A: FLSA SALARY TEST CONFLICTS IN CIRCUITS

FLSA Salary Basis Test & "Window of Correction" 29 CFR Sec. 541.118(a)(6)

Circuit		1st	2nd	3rd	DC	4th	5th	6th	7th	8th	9th	10th	11th	DOL
Win'w of Correct Discuss.		—	YES #2	—	—	YES #6 #7 #8	—	YES #12 #13	YES #14	YES #17	YES #19	—	YES #27	YES
Disj't= Actual Loss Needed		—	NO #2	—	—	NO #6 #7	—	YES #12 #13	NO #14	YES #17	NO #19	—	YES #27	NO
Conj't= Subject To Enough		—	YES #2	—	—	YES #6 #7	—	NO #12 #13	NO #14	NO #17	YES #19	—	NO #27	YES
Formal Policy Enough		—	YES #2	—	—	YES #6 #7 #8	—	NO #12 #13	YES #14	NO #17	YES #19	—	NO #27	YES
Total Revoke Rule Needed		—	YES #2	—	—	YES #6 #7 #8	—	YES #12 #13	YES #14	NO #17	YES #19	—	YES #27	YES
Advance Actual Repay-ment Needed		—	YES #2	—	—	YES #6 #7 #8	—	YES #12 #13	YES #14	NO #17	YES #19	—	YES #27	YES

KEY: Numbers (# __) reference relevant Court of Appeals' precedent.
Full case citations listed by number on following pages.

CASE CITATIONS BY NUMBER:

1st Cir:

No Cases.

2nd Cir:

#1 *Whitmore v. Port Authority*, 907 F.2d 20 (2d Cir. 1990).

#2 *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 1135 S. Ct. 298 (1992).

3rd Cir:

No Cases.

D.C. Cir:

#3 *Hilbert v. District of Columbia*, 23 F.3d 429 (D.C. Cir. 1994).

#4 *Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993).

4th Cir:

#5 *Allen v. County of Fairfax*, 127 Labor Cas. Para. 33,649 (4th Cir. 1994).

#6 *Shockley v. Newport News*, 997 F.2d 18 (4th Cir. 1993).

#7 *IAFF v. Alexandria*, 720 F. Supp. 1230 (E.D. Va.), *aff'd*, 912 F.2d 463 (4th Cir. 1989).

#8 *Hartman v. Arlington County*, 720 F. Supp. 1227 (E.D. Va. 1989), *aff'd*, 903 F.2d 290 (4th Cir. 1990).

5th Cir:

#9 *York v. Wichita Falls*, 994 F.2d 236 (5th Cir. 1991).

6th Cir:

#10 *Michigan Ass'n of Government Employees v. Department of Corrections*, 992 F.2d 82 (6th Cir. 1993).

#11 *Michigan Supervisors' Office & Professional Employees Int.'l Union v. Department of Corrections*, 1995 U.S. App. Lexis 19956 (6th Cir. July 13, 1995), *cert. pending*, Case No. 95-688 (1995).

#12 *Reich v. Pierce*, 1994 U.S. App. Lexis 36194 (6th Cir. 1994). (Pet. App. I).

#13 *Martin v. Monks*, 1993 U.S. App. Lexis 20610 (6th Cir. 1993). (Pet. App. H).

7th Cir:

#14 *Klien v. Rush-Presbyterian*, 990 F.2d 279 (7th Cir. 1993).

#15 *Bankston v. Illinois*, 60 F.3d 1249 (7th Cir. 1995).

#16 *Mueller v. Reich*, 54 F.3d 438 (7th Cir. 1995), *cert. pending*, Case No. 95-586 (1995).

8th Cir:

#17 *Auer v. Robbins*, 65 F.3d 702 (8th Cir. 1995).

#18 *McDonnell v. Omaha*, 999 F.2d 293 (8th Cir. 1993), *cert. denied*, 1145 S.Ct. 1188 (1994).

9th Cir:

#19 *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 785 (1991).

#20 *Barner v. Navato*, 17 F.3d 1256 (9th Cir. 1994).

#21 *Hurley v. Oregon*, 27 F.3d 392 (9th Cir. 1994).

#22 *SEIU v. San Diego*, 35 F.3d 483 (9th Cir. 1994), *en banc denied, supp. op.* 60 F.3d 1346 (9th Cir. 1995), *cert. pending*, Case No. 95-724 (1995).

10th Cir:

#23 *Aaron v. Wichita*, 54 F.3d 652 (10th Cir. 1995).

#24 *Bennett v. Albuquerque*, 1995 U.S. App. Lexis 8901 (10th Cir. April 18, 1995). (Appendix J).

11th Cir:

#25 *Atlanta Professional Firefighters v. Atlanta*, 920 F.2d 800 (11th Cir. 1991).

#26 *Avery v. Talladego*, 24 F.3d 1337 (11th Cir. 1994).

#27 *Lee v. Flightsafety*, 20 F.3d 428 (11th Cir. 1994).

APPENDIX A — DECISION OF THE SUPREME COURT OF VIRGINIA DATED DECEMBER 20, 1995

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday *the* 20th *day of* December, 1995.

Record No. 951430
Circuit Court No. HC-1303-3/95H-396

Douglas W. Luzik, et al.,

Appellants,

against

Commonwealth of Virginia, et al.,

Appellees.

From the Circuit Court of the City of Richmond

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:
David B. Beach, Clerk

By: s/ illegible
Deputy Clerk

APPENDIX B — LETTER OPINION AND ORDER OF THE RICHMOND CIRCUIT COURT DATED MAY 5, 1995

Circuit Court
of the
City of Richmond
John Marshall Courts Building

T. J. Markow
Judge

800 East Marshall Street
Richmond, Virginia 23219

May 5, 1995

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Dear Counsel:

Re: Case No. HC-1303
Luzik, et al. v. Commonwealth, et al.

Appendix B

This matter was tried to the court without a jury over two days. It involves claims by juvenile probation and parole officers that they are entitled under the Fair Labor Standards Act (FLSA or the Act), 29 U.S.C. § 201, *et seq.*, to pay at time plus one-half for any hour worked over forty per week.

Plaintiffs, 103 juvenile probation officers who work in twenty Court Service Units (CSUs) for the Virginia Department of Youth and Family Services (DYFS), filed suit against the Commonwealth alleging a violation of the FLSA. The Commonwealth considers each juvenile probation officer exempt under the Act, therefore none are entitled to receive payment of time and one half per hour if and when they work more than forty hours in a work week. The juvenile probation officers contend their designation as "exempt" under the FLSA is improper.

The issues of liability and damages were bifurcated, and here only the liability claims were litigated. In the liability phase the parties stipulated that testimony as to job duties applies equally to each employee in the position at the twenty different geographic locations throughout the Commonwealth. Accordingly, the only liability issue is whether the Commonwealth has complied with the FLSA in finding the juvenile probation officers exempt. If the officers are exempt from FLSA the case is over, if not it must be tried on the issue of damages.

The burden of proving an exemption under the FLSA rests on the employer. *Clark v. J.M. Burson Co., Inc.*, 789 F.2d 282 (4th Cir. 1986). The Commonwealth must show, one, that each juvenile probation officer is a salaried, rather than an hourly employee, and two, the primary duty of each is an exempt duty.

Appendix B

There are three categories of exempt duties: administrative, professional, or executive. The Commonwealth must satisfy both prongs for a valid exemption to exist.

In regard to ninety-nine of the juvenile probation officers, the Commonwealth claims they are salaried and qualify as either exempt administrators or professionals. The Commonwealth classifies the remaining four as salaried executives. In contrast, the ninety-nine juvenile probation officers argue they are neither salaried nor qualify as exempt administrators or professionals. Three of the remaining four (Hurrin, Carlson, and Locke) concede their primary duties satisfy the "executive" duty exemption, but contend they are not salaried. Carole Grand, the remaining plaintiff, asserts she is neither salaried nor an exempt executive, because her work as a domestic violence case specialist outweighs the time spent on supervisory duties.

The court will first address whether the juvenile probation officers satisfy the "salary basis" test. If not, then the court's inquiry must end, and judgment on liability will be entered in favor of the 103 juvenile probation officers. If so, then the claims of Hurrin, Carlson, and Locke will be dismissed because they qualify as salaried executives. Further, if the "salary basis" test is satisfied the court will address the claims of the remaining 100 juvenile probation officers in regard to the "duties test."

I. Salary Basis Test

Application of the "salary basis" test to public employees has been and is currently evolving. Traditionally, the "salary basis" is satisfied if an employee regularly receives in each pay period, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because

of variations in the quality or quantity of work performed. 29 C.F.R. § 541.118. As amended, any partial day docking after September, 1991, is permissible and does not destroy an otherwise valid exemption.

The juvenile probation officers argue, the "salary basis" test is lost if one of two things occur: they are subject to loss of pay of less than a full pay period for attendance in court as a witness (see 29 C.F.R. § 541.118(4)) or they are subject to a loss of pay for less than a full pay period through nonsafety discipline (see 29 C.F.R. § 541.118(5)). Although they carried no initial burden of persuasion, the juvenile probation officers presented evidence from Cathy Hurrin that her pay was reduced based on its quantity, from Earl McFarland that he was disciplined for a nonsafety reason, and that Greg Luzik was docked pay for attending this trial as a witness on November 23, 1994. Further, the juvenile probation officers cite the fact DYFS had a disciplinary rule in place that "subjected" them to suspension for less than a work week as grounds for violation of the "salary basis" test.

Based on the evidence presented at trial along with the historic evolution of the application of the "salary basis" test to the public sector, the court finds the juvenile probation officers to be salaried employees. The Commonwealth presented evidence from the accounting manager for DYFS who testified that upon his review of the records none of the complainants had their pay reduced for less than a full day since DYFS came into existence. The testimony of Hurrin is insufficient to rebut and convince the court a violation of the "salary basis" test occurred in her case. There was no testimony as to when the alleged reductions occurred or the nature of the absences. These two factors are significant. For instance, if the reductions occurred after September, 1991, per the amendment there is no violation.

As to the nature of the absences, there is no testimony to indicate whether they occurred in a single day, or over multiple partial days. The nature of the absences is important because a docking of a day or more for personal reasons, sickness, or disability is permitted. (see 29 C.F.R. § 541.118 (2), (3)).

Further, the Commonwealth presented evidence that no complainant had received a reduction in pay arising from a disciplinary suspension of less than a full work week. Once again, the DYFS accounting manager testified that upon his review of the records none of the juvenile probation officers received this type of reduction in pay. In fact, the Commonwealth presented documents showing McFarland's suspension took place in November, 1983, prior to the Supreme Court's holding the FLSA applied to the states.

Despite the fact evidence was presented showing that none of them received a reduction in pay for a disciplinary suspension, the juvenile probation officers argue the mere fact that a policy exists that subjects them to a potential loss of pay destroys any purported salaried status. Circuits are split as to the treatment of this issue. The Ninth Circuit held the mere existence of such a policy, absent actual application of the policy, destroys salaried status. *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990). Others have held the mere existence of a policy, absent evidence of actual harm resulting as a consequence of it, does not destroy salaried status. Based on the policies announced by the Department of Labor (DOL) during its revision of the regulations following the *Abshire* decision, this court holds the mere existence of a policy that subjects public employees to a potential reduction in pay that would destroy salaried status, absent a showing that a reduction actually occurred, does not destroy salaried status.

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To hold otherwise would fiscally devastate the Commonwealth and result in a windfall to individuals who never experienced a harm. These same reasons prompted the DOL, following the *Abshire* opinion, to proceed with rule making on an expedited basis on the issue of the proper application of the "salary basis" test to the public sector. This process resulted in the September, 1991, amendment to the regulations which modified aspects of the "salary basis" test as it applied to public employers. The DOL recognized in passing these modifications, as does this court, the unique tension between the requirements of the "salary basis" test and holding public employees accountable to taxpayers for the time they actually work. Therefore, the fact the Commonwealth had a disciplinary rule in place that "subjected" the juvenile probation officers to a potential pay reduction does not destroy their salaried status absent evidence that a reduction actually occurred.

The same reasoning applies to Luzik's alleged loss of pay for attending this trial as a witness. On surrebuttal, the Commonwealth showed Luzik had enough annual leave to cover his absence. Because Luzik had adequate leave, any reduction of pay for appearance at trial as a witness is a purely hypothetical scenario.

Accordingly, this court holds the Commonwealth has shown the juvenile probation officers are salaried employees. As such, the claims of Hurrin, Carlson, and Locke are dismissed because they qualify as salaried executives under the FLSA. The court will now turn to an analysis of the "duties test" as it affects the remaining 100 juvenile probation officers. The Commonwealth claims the ninety-nine plaintiffs are exempt administrators or professionals. The court will discuss each exemption in turn, then conclude with a resolution of Carole Grand's status.

Appendix B

II. Duties Test

A. Administrative

The "short test" for the administrative exemption has three components: one, the employee must be paid at least $250.00 a week; two, the employee's primary duty must be "the performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers;" and three, the employee must perform work that requires the exercise of discretion and independent judgment. 29 C.F.R. § 541.2. The juvenile probation officers concede they satisfy elements one and three. As for element two, the juvenile probation officers contend their work relates only to the service and product of the unit. For the administrative exemption to be satisfied, they argue, their primary duties must involve internal management of the unit. In support of their position, they cite several DOL Letter Rulings and *Bratt v. County of Los Angeles*, 912 F.2d 1066 (9th Cir. 1990).

The Commonwealth counters that the complainants are reading the regulations too narrowly. According to the Commonwealth, the exemption is broad enough to include those whose work affects policy or those who are responsible for exercising or carrying it out. 29 C.F.R. § 541.205 (c). Additionally, individuals who perform work of substantial importance to the management or operation of the business or the customers of the business qualify for the exemption. 29 C.F.R. § 541.205 (c). The Commonwealth claims the juvenile probation officers fall into both categories, and as such satisfy the administrative exemption.

Based upon the testimony at trial, the court finds the ninety-

nine juvenile probation officers qualify for the administrative exemption. The Commonwealth is correct that the plaintiffs are urging a far too narrow application of the administrative duties test. If the court were to follow the plaintiff's interpretation, only those individuals holding "management" positions would qualify. Clearly, the administrative exemption was not intended to apply to such a limited, select group. For example, in the private sector, bank cashiers, insurance agents and claim adjusters have been deemed to fall within the administrative exemption. 29 C.F.R. § 541.205(c).

The work of the juvenile probation officers constitutes an application of the policies of the Juvenile and Domestic Relations District Courts, and is of substantial importance to the court system and the juveniles who come into contact with the system. From the moment the juvenile enters the system until he departs, every decision made by the juvenile probation officers, in the capacity of intake officer, probation supervisor, or parole officer, constitutes an example of implementing the parole policies of the Juvenile and Domestic Relations District Courts. Just a few examples of policy implementation include, whether to detain or divert the juvenile from the court system, recommendations to the judges on how to handle each case, and setting the terms and monitoring the juveniles on parole. All of these duties impact the size and management of the courts' dockets, and in most instances helps expedite the functioning of the juvenile justice system. Beyond the creation of the laws, which can only be done by the General Assembly, the "running" of the courts' business is essentially docket management and case resolution. Plaintiffs are a critical component of docket management. Without question, the work done by the juvenile probation officers is substantially important to these facts of the courts' business and the juveniles affected by their work.

As to the authority cited by the juvenile probation officers, the DOL Letter Rulings are merely advisory and *may* be used by courts in formulating opinions. As the Commonwealth points out in its trial brief, the Department of Labor has issued inconsistent opinions on this issue. The nature of the inquiry in every instance is fact specific, especially in regard to the duties performed by plaintiffs. For this reason the court rejects the DOL Letter Rulings and the *Bratt* case as controlling authority.

Accordingly, this court holds the juvenile probation officers satisfy the administrative duties exemption test under the FLSA. Because the court has previously held the salary basis test is met as well, the Commonwealth has carried its burden in proving the juvenile probation officers are exempt under the FLSA standards.

Although the Commonwealth has carried its burden, the court will go on to discuss the appropriateness of the professional exemption, so that there are no unresolved issues.

B. Professional Exemption

The "short test" for the professional exemption also has three components. One, the employee must be paid at least $250.00 a week; two, the employee's primary duty must be "work requiring knowledge of an advanced type . . ."; and three, the work must require the exercise of discretion and independent judgment. 29 C.F.R. § 541.3. The juvenile probation officers concede elements one and three. As for element two, the juvenile probation officers argue that because there is no formal degree requirement to be hired, the job does not require "knowledge of an advanced type." They contend the fact that each juvenile probation officer must receive training on an annual basis after

hire indicates holding a degree is not required and insufficient to prepare one for the duties of a juvenile probation officer.

Once again the Commonwealth counters the juvenile probation officers are reading the regulations too narrowly. The professional exemption includes traditional "professions" such as lawyers and doctors, but according to the Commonwealth, the exemption is not confined to traditional professions. The duties of and qualifications for a position determine whether it falls within the professional exemption. 29 C.F.R. § 541.304(a). The work must be predominately intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work. 29 C.F.R. § 541.306(a). In fact, the exemption can apply to individuals who have not obtained a degree. 29 C.F.R. § 541.302(a).

The court agrees with the Commonwealth based on the language of the regulations, which defines the intended parameters of the exemption, and upon the evidence presented during the trial. The court rejects the plaintiff's invitation to pigeonhole the scope of the professional exemption. A written policy requiring a degree is not a prerequisite for the exemption. As the Commonwealth cites in the regulations, the duties and qualifications of a position determine its exempt status.

Upon review of the duties of the juvenile probation officers it is clear their work is "predominately intellectual and varied in character." The diversity of the juvenile population along with the knowledge required to perform the duties of a juvenile probation officer demonstrates the plaintiff's must analyze and interpret information. Each juvenile who comes into contact with the juvenile justice system is different, thereby presenting different facts and circumstances to be weighed by the juvenile

probation officer in assessing and making recommendations in regard to the juvenile's case. The testimony of the juvenile probation officers indicates that in order to make the assessment a knowledge of several areas, including normal and abnormal psychology, child development, sociology, child delinquency, and the Virginia code is necessary.

In addition, the Commonwealth presented evidence that the majority of juvenile probation officers employed, including all of the plaintiffs, hold college degrees. Of those individuals who hold degrees, 88% are in the related field of social science. This fact is due not only to a competitive job market, as plaintiffs argue, but also to selective hiring. The directors of several CSUs testified that when screening potential candidates for the position of juvenile probation officer, those individuals with degrees, specifically in a related field, had a competitive edge over others. The fact there is no policy requiring that new hires hold a degree is moot in view of the evidence.

The court finds the Commonwealth carried its burden in proving the juvenile probation officers satisfy the professional exemption as well. The only remaining issue to be decided is whether Carole Grand satisfies the executive exemption.

III. Executive Exemption as it pertains to Carole Grand

The only issue in regard to whether Grand meets the executive duties test is whether her management tasks constitute her "primary duty." Under the regulations, "primary duty" means over 50% of the employee's time. 29 C.F.R. § 541.103.

Grand testified that in addition to her supervisory and management duties, she spends approximately, on average, 3

1/2 hours a day preparing domestic in-take affidavits. In a five day work week, this totals 17.5 hours spent on nonmanagement duties. Over a forty hour work week, at least 22.5 hours are spent on management tasks. Although these figures may fluctuate depending upon the domestic in-take case load, the average indicates Grand spends over 50% of her time in a supervisory/ management capacity. Therefore, this court finds Grand satisfies the executive duties test and is properly deemed exempt under the FLSA.

In summation, the court holds the salary basis test is satisfied in regard to each plaintiff. The ninety-nine juvenile probation officers qualify as exempt administrators and the four remaining plaintiffs qualify as exempt executives under the FLSA. An order implementing this opinion is enclosed.

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s/ T. J. Markow
T. J. Markow

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Enc.

Appendix B

VIRGINIA:

In the Circuit Court of the City of Richmond,
John Marshall Courts Building

HC-1303/95H-396

DOUGLAS LUZIK, et al.

Plaintiff

v.

COMMONWEALTH OF VIRGINIA

Defendant

ORDER

This matter was tried without a jury November 21 and November 23, 1994. Plaintiffs challenged their designation by the Virginia Department of Youth and Family Services as "exempt" under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq.*

For the reasons stated in the court's letter opinion to counsel it is ORDERED that the plaintiffs designation as exempt employees under the FLSA is proper, and that the Commonwealth is not in violation of the FLSA in regard to these plaintiffs.

It is, therefore, ORDERED that the defendant,

Commonwealth of Virginia, shall have judgment, and the plaintiffs shall take nothing from it.

Objections are noted and endorsements waived. Copies of this order were this day mailed to counsel for each party. As all issues in this cause have been resolved, the clerk shall place this among the ended causes.

ENTER 5/5/95

s/ illegible

A Copy,
Teste: BEVILL M. DEAN, CLERK

by s/ Diane L. Farmer D.C.

Appendix B

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ENTER 5/5/95

s/ illegible

APPENDIX C— RELEVANT STATUTES AND REGULATIONS INVOLVED

29 U.S.C.

§ 213. Exemptions

(a) Minimum wage and maximum hour requirements. The provisions of sections 6 (except section 6(d) in the case of paragraph (1) of this subsection) and 7 [29 USCS §§ 206, 207] shall not apply with respect to—

> (1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act except than [that] an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweak are devoted to such activities); . . .

* * * *

29 C.F.R. Part 541

§ 541.2 Administrative.

The term *employee employed in a bona fide* * * * *administrative* * * * *capacity* in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of either;

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(1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or

(2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c)(1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section:

Appendix C

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than $225 per week beginning February 13, 1981 and $250 per week beginning February 13, 1983 ($180 per week beginning February 13, 1981 and $200 per week beginning February 13, 1983, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, or

(2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which employed: *Provided*, That an employee who is compensated on a salary or fee basis at a rate of not less than $320 per week beginning February 13, 1981 and $345 per week beginning February 13, 1983 ($260 per week beginning February 13, 1981 and $285 per week beginning February 13, 1983, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section.

* * * *

§ 541.3 Professional.

The term "employee employed in a bona fide * * * professional capacity" in section 13(a)(1) of the Act shall mean any employee:

Appendix C

(a) Whose primary duty consists of the performance of:

(1) Work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or

(2) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee, or

(3) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system or educational establishment or institution by which he is employed; and

(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential

part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; and

(e) Who is compensated for services on a salary or fee basis at a rate of not less than $250 per week beginning February 13, 1981 and $280 per week beginning February 13, 1983 ($225 per week beginning February 13, 1981 and $250 per week beginning February 13, 1983 if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: *Provided,* That this paragraph shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof, nor in the case of an employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of medicine or any of its branches, nor in the case of an employee employed and engaged as a teacher as provided in paragraph (a)(3) of this section: *Provided further,* That an employee who is compensated on a salary or fee basis at a rate of not less than $320 per week beginning February 13, 1981 and $345 per week beginning February 123, 1983 (or $260 per week beginning February 13, 1981 and $285 per week beginning February 13, 1983 if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance either of work described in paragraph (a)(1) or (3) of this section, which includes work requiring the consistent exercise of discretion and judgment, or of work requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section.

Appendix C

§ 541.118 Salary basis.

(a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

(1) An employee will not be considered to be "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

(2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's particular plan, policy or practice provides compensation for

such absences, deductions for absences of a day or longer because of sickness or disability may be made before an employee has qualified under such plan, policy or practice, and after he has exhausted his leave allowance thereunder. It is not required that the employee be paid any portion of his salary for such days or days for which he receives compensation for leave under such plan, policy or practice. Similarly, if the employer operates under a State sickness and disability insurance law, or a private sickness and disability insurance plan, deductions may be made for absences of a working day or longer if benefits are provided in accordance with the particular law or plan. In the case of an industrial accident. the "salary basis" requirement will be met if the employee is compensated for loss of salary in accordance with the applicable compensation law or the plan adopted by the employer, provided the employer also has some plan, policy or practice of providing compensation for sickness and disability other than that relating to industrial accidents.

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

(6) The effect of making a deduction which is not permitted under these interpretations will depend upon the

facts in the particular case. Where deductions are generally made when there is no work available. it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

* * * *

§ 541.5d Special provisions applicable to employees of public agencies.

(a) An employee of a public agency who otherwise meets the requirements of § 541.118 shall not be disqualified from exemption under §§ 541.1, 542.2, or 541.3 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because—

(1) permission for its use has not been sought or has been sought and denied.

(2) accrued leave has been exhausted; or

(3) the employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid "on a salary basis" *except* in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

[57 FR 37677, Aug. 19, 1992]

* * * *

Appendix C

56 FED. REG. 37666 (AUG. 19, 1992)

DEPARTMENT OF LABOR

Employment Standards Administration
Wage and Hour Division

29 CFR Part 541
57 FR 37666
August 19, 1992

Exemptions From Minimum Wage and Overtime Compensation Requirements of the Fair Labor Standards Act; Public Sector Employers

AGENCY: Wage and Hour Division. Employment Standards Administration. Labor.

ACTION: Final rule.

SUMMARY: This document provides revised final Regulations, 29 CFR part 541, governing the criteria for exemption from the minimum wage and overtime compensation requirements of the Fair Labor Standards Act ("FLSA" or "Act") for public sector employees employed in *bona fide* executive, administrative, and professional capacities. A special, limited exception from the exemption's requirement for payment "on a salary basis" is provided for certain public sector pay systems that reduce the pay of otherwise-exempt employees for partial-day absences when paid leave is not used to cover such absences, and for deductions due to budget-required furloughs.

EFFECTIVE DATE: September 18, 1992.

* * * *

II. Background

A. Summary of Statutory and Regulatory Provisions

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The FLSA (29 U.S.C. 201, *et seq.*) requires that covered, non-exempt employees receive not less than the Federal minimum wage for all hours worked and overtime premium pay (at one-and-one-half times the regular rate of pay) for all hours worked over 40 in a workweek. Section 13(a)(1) of the Act (29 U.S.C. 213(a)(1)) provides a statutory exemption from these requirements for employees employed in a *bona fide* executive, administrative, or professional capacity, as follows:

Section 13. (a) The provisions of sections 6 (except section 6(d) in the case of paragraph (1) of this subsection) and 7 shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as much terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act * * *).

The scope of the exemption provided by Section 13(a)(1) of the FLSA is defined and explained in Department of Labor regulations, codified at 29 CFR part 541. The regulations generally require that, to be exempt, employees must meet specified regulatory standards with respect to their job duties and responsibilities, and be compensated "on a salary basis" at a level that is not less than the stated amounts.[1]

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[1] The existing exemption criteria include specified duties and responsibilities tests, in addition to a salary requirement. To qualify, an employee must be paid a weekly salary of a least $155 as an executive or administrative employee, and $170 as a professional, and must meet all the other tests (the "long tests" for exemption). If such employees receive $250 (or more) in salary,

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Employees whose terms and conditions of employment meet the stated exemption requirements need not be paid the FLSA minimum wage or overtime premium pay for hours worked over 40 per week.

The regulations defining "salary basis" (at § 541.118) provide that an employee will be considered to be paid "on a salary basis" if the employee regularly receives each pay period a predetermined amount constituting all or part of the employee's compensation and the predetermined amount is not subject to reduction because of variations in the quality or quantity of work performed. Subject to specified exceptions, the employee must receive the full salary for any week in which any work is performed without regard to the number of days or hours worked, subject also to the general rule that an employee need not be paid for any workweek in which no work is performed.

Deductions may not be made " * * * for absences occasioned by the employer or by the operating requirements of the business," such as "deductions * * * for time when work is not available" (§ 541.118(a)(1)). Deductions also may not be made for activities such as jury duty, attendance as a witness, or temporary military leave (§ 541.118(a)(4)).

Deductions may be made from an employee's predetermined compensation without invalidating the employee's salaried status when an employee is absent from work for a full day or more for personal reasons, other than sickness or accident, as provided in § 541.118 (a)(2). Deductions are also permitted for absences of a day or more because of sickness or disability if the employer has a *bona fide* plan, policy or practice that pro-

a shorter, less-stringent duties test applies (the "short test" or "upset salary test"). Consideration of these compensation levels will be undertaken in connection with any further rulemaking.

vides compensation for loss of salary due to sickness and disability (§541.118(a)(3)). Deductions imposed "in good faith for infractions of safety rules of major significance" also will not affect an employee's salaried status (§ 541.118(a)(5)).

The regulations also state that the effect on the salaried status of an employee, and thus eligibility for exemption, when an impermissible deduction is made will depend upon the facts in each case. This provision permits an employer who makes impermissible deductions from the predetermined compensation of an otherwise salaried employee to reimburse the employee for the deductions in certain circumstances, thereby restoring the exempt status of the employee. In particular, § 541.118(a)(6) provides:

> (6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable * * * during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

The salary requirement has been an integral part of the 541 regulations since 1940. The existing regulatory interpretation of "salary basis" dates back to 1954 (19 FR 4405; July 17, 1954). These provisions were developed from extensive hearings and record evidence showing that executive, administrative, and professional em-

ployees employed in industries then-subject to the FLSA, which excluded governmental employers, were nearly universally paid on a salary basis. Employers not compensating on a salary basis have had ample opportunity to conform their pay practices to the requirements if they chose to claim exemption for their employees, or pay overtime premium pay. In contrast, the public sector pay policies at issue in this rulemaking evolved over the years subject to constraints in statutes, ordinances or policies based on public accountability principles that preclude paying public employees for hours not worked, under systems that regarded management employees as being exempt from overtime.

B. Legislative History of the FLSA in the Public Sector

Since FLSA was enacted in 1938, the Congress and the U.S. Supreme Court have periodically acknowledged the special circumstances of, and different treatment to be accorded to, governmental employers and employees under the FLSA, as distinguished from the private sector. Originally, the FLSA did not apply to employees of States or political subdivisions. Congress extended coverage in 1966 to employees of State and public entities operating transit companies, hospitals, schools and related institutions. The U.S. Supreme Court upheld the constitutionality of applying the Act to such entities in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968).

In 1974, Congress extended coverage to all public sector employees, exempting only elected officials and their immediate staffs. It did so with the stated intent to cover virtually all public sector employees who were not within the scope of the section 13(a)(1) exemption. The committee report accompanying the bill that became the 1974 Amendments described the provisions affecting Federal, State and local government employees in the following manner:

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> Section 6 of the bill extends minimum wage and overtime coverage to about 5 million *non-supervisory* employees in the public sector not * * * [then] covered by the Act. * * * The bill will provide that virtually all *non-supervisory* government employees will be covered. * * * By the same token, the committee intends to cover all employees (*except professional, executive, and administrative personnel who are exempted under section 13 of the law*) in all civilian branches of the Federal Government." (H.R. Rep. No. 93-313, p. 27 (1974); emphasis added.)

In 1976, however, the U.S. Supreme Court considered the special nature of State and local governments under the FLSA and ruled that the FLSA's minimum wage and overtime pay provisions could not constitutionally be applied to State and local government employees engaged in traditional governmental activities. (*National League of Cities v. Usery*, 426 U.S. 833 (1976).) The Court expressly overruled *Maryland* v. *Wirtz* with regard to the Act's application to public school and hospital employees, but National League did not alter the continued application of FLSA to employees engaged in activities that are not "traditional" functions of government.

In 1985, the Supreme Court reversed National League in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The Court reasoned that sufficient authority existed to apply the FLSA to State and local governments under the commerce clause of the Constitution and found that applying Federal regulation based on the distinction between "traditional" and "nontraditional" governmental functions was unsound and unworkable. In response to Garcia, Congress amended the FLSA in November 1985 to address particular concerns of State

and local governments and to provide relief from liability during a temporary adjustment period after the Garcia decision. New provisions were added to allow the use of compensatory time off in lieu of cash wages for overtime in the public sector, with a higher maximum limit on the number of hours that can be accumulated by public safety and certain other employees; to include overtime exemptions for certain employment situations in which employees work dual jobs; and to provide special rules for public agency volunteers. The 1985 Amendments did not, however, affect section 13(a)(1) of the Act or specifically address the application of the executive, administrative, or professional employee exemption to State and local government employees. Neither the statutory changes nor the legislative history of the 1985 Amendments contain any significant references to section 13 (a)(1) or 29 CFR part 541.

C. Public Sector Pay Systems and the FLSA

Some State and local government jurisdictions operate pay policies based on constitutional or statutory provisions while others are derived from regulations or policies that have evolved over the years. The rules and procedures of many of these pay systems were in place long before FLSA coverage of the public sector brought on by the 1985 Garcia decision. Such pay systems are generally premised on a concept derived from principles of public accountability that governmental employees should not be paid for time not worked due to the need to be accountable to the taxpayers for the expenditure of public funds.

At the time of Garcia, therefore, most public employers had in place compensation systems requiring all employees, regardless of how paid, to use accrued leave time

or incur a reduction in pay for any absences from work. Such Governmental payroll systems prohibited paying employees for time not actually worked that was not covered by accrued leave, regardless of whether the time not worked was greater or less than one full work-day. Thus all public employees under such systems, including highly-compensated managers who otherwise would clearly be exempt from the overtime requirements, could be classified as non-salaried and thus non-exempt. As a consequence, few public employers compensated employees in a manner that would satisfy the "on a salary basis" provision required by the regulations.

The Department first observed this anomaly when responding to written inquiries from public sector employers following the Supreme Court's Garcia decision in 1985. It was also raised in public comments received on the Department's Advance Notice of Proposed Rulemaking (ANPR) on Part 541 published in the Federal Register on November 19, 1985 (see 50 FR 47696), before the 1985 FLSA Amendments went into effect. One issue raised in the ANPR was whether the salary tests for exemption should be increased or eliminated.

During this same time frame, the Office of Personnel Management (OPM) issued regulations on the 541 exemption for executive, administrative, and professional employees of the federal government. Under OPM's regulations, exempt status was determined according to grade level and the position classification system rather than salary, and did not include a "salary basis" requirement.[2]

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[2] Section 4(f) of the FLSA provides that the Department of Labor will administer the Act for employees employed in the Library of Congress, the United States Postal Service, the Postal Rate Commission, and the Tennessee Valley Authority. OPM administers FLSA with respect to all other employees of the Federal

With this background, the ANPR also raised the question "[s]hould the Department recognize individual State and local government civil service systems for classifying [executive, administrative, and professional] EAP employees in applying the exemption to employees of such governments?"

Two commenters responding to the ANPR pointed to the conflict between State and local laws and § 541.118 by noting that State or local laws frequently prohibit employees from being paid for time not actually worked, or not covered by annual, sick, or other types of paid leave. These commenters cited the example of an otherwise exempt public employee who is absent from work for personal reasons, or is unable to work because of illness or accident, where the employee has not accrued, or has exhausted, paid leave time, being paid only for the hours actually worked in accordance with applicable State or local law. Consequently, a public employer that makes deductions from pay for absence(s) computed on an hourly basis would not be in compliance with the "salary basis" requirements in § 541.118 that allow for deductions to be made in such cases only for absence(s) of a full day or longer.

The Department also received comments expressing concerns about the "salary basis" requirement for exemptions for public sector employers in response to proposed regulations issued to implement the 1985 FLSA Amendments (51 FR 13402: April 18, 1986). These comments were noted in the preamble to the final rule as follows:

Government except certain Congressional employees. See 29 U.S.C. section 204(f). Reorganization Plan No. 2 of 1978 (92 stat. 3783), and section 8 of the Fair Labor Standards Amendments of 1989 (Pub. L. 101-157).

Finally, several commenters requested various forms of special treatment for State and local governments with respect to the section 13(a)(1) exemption for bona fide executive, administrative, and professional employees, particularly with respect to the requirement in 29 CFR Part 541 that such employees be paid on a salary basis. The commenters argued that State and local governments should be permitted to make deductions from an exempt employee's salary for absences of less than a day. They argued that this change is necessary to recognize current payroll practices, as well as State and local government laws which preclude the payment of wages for hours not worked (except for earned leave).

On November 19, 1985, the Department of Labor published in the Federal Register (50 FR 47696) an advance notice of proposed rulemaking requesting the views of the public on any changes they felt were necessary in 29 CFR part 541. The comment period ended on March 22, 1986. However, the Department expects to publish a notice of proposed rulemaking concerning Part 541 during 1987. Interested parties will have an opportunity to offer comments on the subject matter of that regulation at that time.

In light of the separate rulemaking process with respect to part 541, it would not be appropriate for the Department to address this issue in developing a final rule for part 553.

* * * *

And:

Several commenters, including various cities, the National League of Cities (NLOC) and the National Pub-

lic Employer Labor Relations Association (NPELRA). stated that 29 CFR part 541 should be revised to eliminate the requirement that an exempt employee be paid on a salary basis.

As discussed earlier under § 553.32, there is a separate rulemaking process with respect to part 541.

Therefore, it would not be appropriate for the Department to address this issue in developing a final rule for part 553.

This discussion of comments received on proposed 29 CFR §§ 553.32 (at 52 FR 2019) and 553.216 (at 52 FR 2023) was published in the Federal Register January 16, 1987.

* * * *

E. Developments in Private Lawsuits

The Wage and Hour Division's 1987 enforcement policy expressly stated that it was not intended to affect the rights of public employees to file private lawsuits under section 18(b) of the FLSA.[3] Since the Supreme

[3] Under section 10 of the Portal-to-Portal Act of 1947, Public Law No. 40, 80th Cong., ch. 52, 1st Sess. (29 U.S.C. 251 *et seq.*), an employer has a defense against liability for failure to pay minimum wages or overtime compensation under the FLSA if the employer pleads and proves that "* * * the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, * * * or any administrative practice or enforcement policy of [the Wage and Hour Administrator] with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." (*See also* 29 CFR 790.13 & .18.)

Court's *Garcia* decision in 1985, numerous lawsuits have been filed by public employees seeking to recover overtime premium pay from their employers, and in many of these cases the resolution of the exempt status of employees turned solely on the court's reading of the "salary basis" requirement in the regulations. The courts have interpreted the construction of the regulations in different ways, reaching different results.

In circumstances where the public entity's pay practices called for the docking of pay for partial-day absences when leave was not available, some courts concluded that a salary was not "subject to" deductions where there was no evidence that the employee's pay was ever reduced; that only actual and not "theoretical" deductions could invalidate the salary basis of compensation;[4] and that rare instances of docking pay for absences of less than a day did not defeat eligibility for the exemption except in the workweek in which a deduction was made.[5] Other courts have allowed public employers to utilize the "remediation" provisions at 29 CFR 541.118(a)(6) to preserve the exempt status of employees in cases where inadvertent deductions were made from pay for absences of less than a day when leave was exhausted, the affected employees were reimbursed for such deductions, and the employer promised to comply in the future.[6]

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[4] See, e.g., *Atlanta Professional Firefighters Union v. Atlanta*, 920 F.2d 800 (11th Cir. 1991); *Harris v. District of Columbia*, 709 F. Supp. 238 (D.D.C. 1989).

[5] See, *D.C. Nurses Assn. v. District of Columbia*, 29 WH Cases 808 (D.D.C. 1988).

[6] See, e.g., *Hartman* v. *Arlington County, Va.*, 720 F. Supp. 1227 (E.D. Va. 1989), aff'd, 903 F.2d 290 (4th Cir. 1990); *Fire Fighters Local 2141* v. *City of Alexandria, Va.*, 720 F. Supp. 1230 (E.D. Va. 1989), aff'd, 912 F.2d 463 (4th Cir. 1990); *Harkins* v. *City of*

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In contrast, other courts determined that the exemption was inapplicable under the "salary basis' requirement solely because a public entity's pay system required docking of pay when leave was not available. Some courts held that employees under such a pay system calling for deductions to be made when the employee is absent and has no leave are not paid "on a salary basis" even if no such deductions have in fact occurred.[7]

Such judicial interpretations and accompanying confusion were exposing governmental employers to potentially enormous and generally unexpected back wage liabilities for many employees who would clearly be exempt but for the treatment of leave and the docking of pay for partial-day absences when leave was unavailable. Following the denial of certiorari (January 1991) and petition for rehearing (March 1991) in Abshire, representatives of State and local governments, including the National League of Cities, the United States Conference of Mayors, and the League of California Cities, presented their urgent concerns to the Department arising from the flood of lawsuits being filed by public employees and requested prompt action by the Department to address the matter in light of the anticipated effects of post-Abshire litigation.

Chesapeake, 29 WH Cases 1399 (E.D. Va. 1988); *Chadwick* v. *City of Norfolk, Va.*, 29 WH Cases 1407 (E.D. Va. 1988); and *Sarver* v. *City of Roanoke, Va.*, 29 WH Cases 1442 (W.D. Va. 1989).

[7] See, e.g., *Abshire* v. *County of Kern*, 906 F.2d 483 (9th Cir. 1990), cert. denied, 111 S.Ct. 785 (1991), rehearing denied, 111 S.Ct. 1341 (1991); *Banks* v. *City of North Little Rock*, 708 F. Supp. 1023 (E.D. Ark. 1988); *D'Camera* v. *District of Columbia*, 693 F. Supp. 1208 (D.D.C. 1988); *Hawks* v. *City of Newport News, Va.*, 707 F. Supp. 212 (E.D. Va. 1988); *Harrison* v. *District of Columbia*, 30 WH Cases 557 (D.D.C. 1991).

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These State and local government representatives indicated that, without immediate action by the Department of Labor to revise the regulations for State and local governments, the potential liabilities for affected governmental entities would become devastating. They expressed concern over the fundamental inequity of courts granting windfall awards of across-the-board retroactive overtime payments to public employees who never had any actual deductions made in their salaries, along with employees who rarely had such deductions, but all of whom would be entitled to substantial back pay under Abshire simply because their salaries were theoretically "subject to" the possibility of docking.[3] They asserted that this resultant windfall was not required by, and that Abshire was an extreme interpretation of, DOL's regulations. They stated their belief that § 541.118(a)(6) allows public employers to make occasional deductions in the salary of individual employees without defeating the salary basis for all employees, so long as the deductions are not significant in relation to the total compensation paid all similarly classified exempt employees; moreover, that the exemption would be lost for an individual em-

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[3] Mayor David Dinkins of New York City described the situation in an August 14, 1991 letter to Secretary of Labor Lynn Martin as follows:

The City of New York, along with many other jurisdictions, faces serious fiscal problems. To meet those problems we have already cut services and laid off thousands of employees. The layoff of State and Local government employees has been cited by the staff of the Federal Reserve Board as a reason for the continuing weakness in the economy. To exacerbate those fiscal problems and those layoffs to pay overtime to management employees because of the application to the public sector of a regulation designed for the private sector would be contrary to the public interest.

ployee if the deductions in pay are regular and recurring vis-a-vis that individual employee; that in the event of occasional deductions, a public employer should be permitted to pay overtime to the affected employees who have been docked for the specific work periods in which the deductions were made without losing the exemption for employees whose pay was not docked or for the docked employees in pay periods in which no docking took place; and, that in the event of regular and recurring deductions, the exemption should be denied to the affected employee only, in all workweeks it is claimed, including those weeks when no deductions are made. They supported their views by noting prior Wage and Hour opinion letters which they asserted stated that occasional docking of salary by a public employer, after exhaustion of available leave, would only result in a loss of the exemption for the employee whose pay was docked, and only then for the period (i.e., workweek) in which the deduction occurred (citing opinion letters of the Wage and Hour Administrator dated January 15, 1986 ((reprinted in Fair Labor Standards Handbook For States, Local Governments & Schools, supra, p. 69)); January 17, 1986 ((unpublished)) ((which states that "[w]here an occasional deduction that is not permitted by § 541.118 is made from the salary of an otherwise exempt employee, the exemption would be lost in that workweek when the deduction was made.")); and July 17, 1987 ((reprinted in Fair Labor Standards Handbook For States, Local Governments & Schools, supra, p. 159)) ((discussing "losing the exemption for that week" and noting "[i]t is our opinion that, although the employee would be considered a nonexempt employee during those weeks when paid on an hourly rate basis, it would not affect the employee's exempt status in other weeks when the em-

ployee is paid on a salary basis."))) Some courts, they observed, had adopted positions consistent with their interpretations and, in fact, had relied upon the cited opinion letters in deciding that the exemption was still available to public employers operating such leave "systems" that reduced the pay of employees for absences of less than a day.[9]

F. The Department's September 1991 Rulemaking

Because of concerns that the unexpected liabilities threatened to seriously impair the fiscal integrity of many State and local governmental agencies, and would disrupt widespread, long-standing pay practices that had been designed to serve the public trust, the Department undertook separate rulemaking on the specific issue of application of the "salary basis" rule to public sector employees, while continuing its overall review of the full range of issues under 29 CFR part 541 raised by the public comments submitted on its ANPR of November 19, 1985 (50 FR 47696). Recognizing the special circumstances of public sector employment, under which employees are paid pursuant to pay systems established according to principles of public accountability, and in light of the potentially enormous, unforeseen liability which could threaten the governments' fiscal integrity as a result of retroactive overtime payments to public employees considered exempt by their employers, the Department proceeded with rulemaking on an expedited basis, finding good cause to waive the normal requirement for prior notice and comment.

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[9] See, e.g., *DC Nurses Assn.* v. *District of Columbia, supra,* 29 W.H. Cases at 889 n. 1; *Fire Fighters Local 2141* v. *City of Alexandria, VA., supra,* 720 F. Supp. at 1232; *Harris* v. *District of Columbia, supra,* 709 F. Supp. at 241.

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The Department published an Interim Final Rule (IFR) on September 6, 1991 (56 FR 45824), inviting public comments for 30 days, modifying the "salary basis" rules affecting eligibility for exemption under section 13(a)(1) of FLSA for employees in the public sector only. The Department issued the IFR to allow State and local governments to continue their public-accountability pay systems without incurring liability for overtime pay under FLSA to employees who would otherwise be exempt from the overtime pay requirements. A new § 541.5d was added to the regulations to provide that an otherwise exempt public sector employee who is paid according to a pay system that requires the use of paid leave for partial-day absences for personal reasons or due to illness or injury and, when leave is not used or is exhausted, reduces the employee's pay for such absences of less than one full work-day, will not be disqualified from exemption due to such pay system. The rule also provided that the exemption would not be defeated by deductions from salary caused by budget-required furloughs that are not regular and recurring, except in the workweek in which a deduction occurs. The Department left all other aspects of the salary test unchanged, as well as the duties and responsibilities tests of the exemption, as applied to employees in the public sector.

The Department also published a Notice of Proposed Rulemaking (NPRM) on the same day (56 FR 45828; September 6, 1991), inviting public comment for 30 days on a separate proposal at 29 CFR 541.118(a)(6)(ii) to allow public sector employers with pay systems as specified in the IFR, under which past deductions were made in the pay of otherwise exempt public employees for absences of less than one work-day for personal reasons or due to sickness or injury, to reimburse the employees for those deductions that occurred before the IFR went into effect and thereby restore the employees' eligibility for exemp-

tion. The regulatory proposal also provided that the "salary basis" component of the exemption would not be disallowed under such pay systems where no actual deductions were made before the IFR went into effect. Upon review of the comments submitted on the NPRM, the Department is withdrawing the proposal from further consideration and it will not be implemented as a final rule. See, published elsewhere in today's *Federal Register*, a document that withdraws this NPRM. The Department will be proposing a legislative remedy to address such retroactive liability.

In response to a request from representatives of labor organizations affiliated with the AFL-CIO and its Public Employee Department, on October 4, 1991, the Department extended the public comment period for an additional 30 days on both the IFR and the NPRM (see 56 FR 50256; 56 FR 50302), and the period for public comment closed on November 6, 1991.

The Department received a total of 398 comments during the comment period, generally as follows:

—229 in favor, from governmental entities, associations or individuals (23 States or State agencies and other entities (e.g., university, etc.); 124 cities (or agencies thereof); 46 counties (or agencies thereof); 29 associations of governments (e.g., National League of Cities, U.S. Conference of Mayors, National Association of Counties, etc.); and 7 others including law firms;

—169 opposed, from employees, unions and associations, law firms, or individuals (137 employees, including 114 individuals who are employee-plaintiffs in a lawsuit pending against the City of New York); 25 employee associations/unions; and 7 others, including law firms.

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In addition, in response to the President's directive to Federal agencies to involve the public and other interested parties in evaluating existing regulations and programs to identify initiatives that would eliminate unnecessary regulatory burdens or otherwise promote economic growth, the Department published a Request for Information in the *Federal Register* on February 24, 1992 (57 FR 6301), requesting public input on the Department's current regulations and those under consideration in terms of identifying burdens placed on the economy, inhibitions to growth, and the benefits achieved by the regulations. Representatives of the governments of thirty States, the District of Columbia, Salt Lake City, Utah, Personnel Administrators of Texas Senior Colleges and Universities, the International Personnel Management Association, and the National Association of State Personnel Executives responded to this Notice offering views on the effect of Regulations, 29 CFR Part 541, on the public sector, stating that lawsuits were resulting in windfall back wage payments as a result of technical violations of the "salary basis" test, and suggesting other areas of difficulty under the duties and responsibilities tests for exemption as an "administrative" employee under § 541.2. Several comments were also received suggesting revisions or review of other aspects of Regulations, 29 CFR part 541, including its application to the private sector. Some private sector commenters have suggested that modern compensation practices, especially those adopted to provide increased flexibility in the workplace and to reduce artificial distinctions among classes of employees, have made the salary basis test anachronistic. The Department is currently reviewing these comments, as well as those received in response to the 1985 ANPR, in order to determine what further rulemaking proceedings may be appropriate with regard to these and the other issues raised.

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With regard to the public sector, which is the subject of this rulemaking, it is clear to the Department, after review of all of the comments, that certain aspects of the "salary basis" test for distingiushing exempt from non-exempt employees did not serve their intended purpose when applied to the public sector, as aspects of the "salary basis" requirement are unduly restrictive when applied in the public sector. In the Department's view, these aspects are not valid indicators of the *bona fides* of a claimed exemption under section 13(a)(1) in the public sector where every employee may theoretically be subject to potential docking for partial-day absences. State and local governments were thus being inappropriately deprived of the opportunity to apply the section 13(a)(1) exemption to their employees who would otherwise be properly exempt. For these reasons, the Department is of the view that public sector pay systems have to be analyzed differently from private sector pay systems.

The major comments received on the current rulemaking are summarized below, together with a discussion of the significant changes that have been made in the final regulatory text in response to the comments received. A number of comments were submitted that focused on issues in the regulations on which the Department had not proposed changes or invited public comment, which the Department will not be addressing at this time. However, to the extent appropriate, the Department will consider these views in the context of its overall review of the full range of issues being considered in connection with the Department's November 1985 ANPR and February 1992 Request for Information.

III. Summary of Major Comments

As a preliminary matter, one law firm (Fisher & Phillips) commented that the narrative discussion in the pre-

amble to the IFR (at p. 45824 of the September 6, 1991, *Federal Register*) incorrectly stated the requirements of the salary test in the exemptions discussed in part 541 when it suggested that "[c]ompensation must be greater than the amount specified in the regulations, and must be on a salary basis.' " The comment is correct. Under the regulations, compensation must be ". . . at a rate of not less than . . ." the amounts specified in the regulations.

Comment: Clarify the applicability of the remaining elements of the "salary basis" test.

Several commenters (American Federation of Teachers (AFT); International Association of Fire Fighters (IAFF); United Auto Workers (UAW)) commented that it was not clear that public employers continued to remain subject to all other aspects of the "salary basis" test in the regulations, stating that some public employers have attempted to argue in pending lawsuits that the Department's interim final rule completely eliminated all aspects of the "salary basis" test in the public sector.

The Department's interim final rule did not eliminate altogether the "salary basis" test in the public sector. A public sector employer must still be able to demonstrate that a claimed exempt employee satisfies all other aspects of the "salary basis" requirements for exemption. The interim final rule states specifically that to be exempt under the new exception an employee must be one " * * * who otherwise meets the requirements of § 541.118 * * *," the regulation which defines payment on a salary basis. The new § 541.5d added to the regulations provides that an otherwise exempt public sector employee would not be disqualified from exemption " * * * on the basis that * * * " the employee is paid according to public pay systems that require the use of paid leave and, when leave is not used or is exhausted, reduce employees' pay for

absences of less than one full work-day for personal reasons or due to illness or injury. The rule also provided that eligibility for exemption would not be defeated by deductions from salary caused by budget-required furloughs that are not regular and recurring. except in the workweek in which a deduction occurs. Only partial-day deductions from pay when leave was not used or was exhausted and furlough-required deductions were addressed by the interim final rule. All other aspects of the salary test were left unchanged for the public sector, as these commenters pointed out.

* * * *

Comment: It is inappropriate to apply the section 13 (a)(1) exemption for public sector employers differently than for private sector employers.

A number of commenters (AFT; Carrol, Burdick & McDonough on behalf of the California Department of Forestry Employees Association (Local 2881 IAFF); Brenda J. Carter. Esq.; Davis, Reno & Courtney on behalf of the Engineers and Architects Association. Los Angeles, CA; IAFF; International Union of Police Associations; LIUNA; National Association of Police Organizations; SEIU; and Zwerdling, Paul, Lebig, Kahn & Thompson) suggested that there is no basis for the Department to distingiush between the private and public sectors under the section 13(a)(1) exemption. Some of these commenters pointed to the 1985 FLSA Amendments as clear evidence that the lack of attention to this issue by Congress in those Amendments reflected a specific Congressional intent not to distingiush between these two types of employment for purposes of applying section 13(a)(1) of the Act. Another commenter (Council of Engineers and Scientists Organizations) stated that the 1974 FLSA Amendments demonstrate that Congress intended to extend the same. equal protection to employees

in the public and private sectors. One other commenter (AFSCME) suggested that the Department could have encouraged public employers to alter their policies concerning deductions of less than a day or that less drastic remedial measures could have been taken, such as altering the regulations to require that an actual deduction of pay occur before the exemption is lost.

The regulations defining the section 13(a)(1) exemption, largely in their present form, were adopted long before Congress extended the rights and protections of the FLSA to employees in the public sector.[11] Thus, the practice of docking public employees' pay for partial-day absences when paid leave was not available was not initially a concern in the administration of section 13(a)(1) of the FLSA.

Significantly, the existing regulatory requirements were adopted following public hearings in the 1940's and 1950's, which included evidence from witnesses showing that *bona fide* executive, administrative, and professional employees in the industries at that time subject to the FLSA were almost universally paid on a salary basis. These fact-based inquiries, conducted before the public sector became subject to the FLSA, did not include an examination of prevailing governmental pay practices. The historical record based on contemporaneous evidence also indicated that employees who did not meet the salary test generally also did not meet the other requirements

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[11] The general requirement that an exempt employee be paid "on a salary basis" has been an integral part of the regulations since 1940, and 29 CFR 541.118 ("salary basis") has remained essentially unchanged since revisions were last made in 1954.

of the exemption.[12] The opposite is true with respect to the Department's current rulemaking, which was intended to address prevailing public sector pay systems operating under statute, ordinance, regulation, or other established public policy requiring all employees, including otherwise-exempt managers and executives, to use accrued leave time or incur a reduction in pay for any absences from work.

When FLSA coverage was extended to include public sector employees, separate provisions were not added to the regulations to define the section 13(a)(1) exemption in a manner that would distinguish public from private sector employment.

However, it is clear from a plain reading of FLSA's legislative history in 1974 (quoted in section II.B. above) that Congress intended for the section 13(a)(1) exemption to be available for public sector employees. Congress presumably was unaware that, because many public sector compensation systems preclude payment for hours not worked, these systems would, solely for that reason, be found to fail to meet the regulatory "salary basis" component of the exemption. In light of the public accountability principles prevalent in public sector pay systems, the regulatory requirements adopted before Congress extended FLSA coverage to State and local governments simply could not operate in a manner that effectively distinguished exempt from non-exempt public employees. The regulations were thus out of harmony with the intent of the statute because State and local governments could not practically avail themselves of the exemption intended by Congress, and thus were inappropriate as applied in the public sector.

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[12] See, e.g., Proposed revision of Regulations, Part 541, under the Fair Labor Standards Act. Report and Recommendations (U.S. Department of Labor, Wage and Hour and Public Contracts Division, Washington, D.C. March 3, 1958), p. 2.

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The fact that public sector employers had pay systems that prevent them from paying employees for part-day absences when paid leave is not available, and thus could invalidate the exemption for all employees "subject to" such pay systems under the principles set forth in *Abshire*, was not generally recognized to be the problem it is today when the 1985 Amendments were enacted. The 1985 legislation's silence on this issue is not indicative, in the Department's view, of an intent to make the section 13 (a)(1) exemption unavailable to public sector employers because of the nature of their pay systems.

Congress expressly authorized the Secretary of Labor to prescribe the requirements for exemption under section 13(a)(1) of the Act when it provided that "* * * such terms are defined and delimited from time to time by regulations of the Secretary * * *." Had Congress felt that the Department should not be free to revisit and revise its regulations in the future based on its enforcement experiences, it would have amended the statute to remove the Secretary's discretion to "* * * define[] and delimit[] from time to time by regulations * * *." The Congress has not made such a change throughout the history of the Act despite the numerous opportunities by the Congress over the years to amend section 13(a)(1).

Furthermore, the regulations promulgated immediately after enactment of the FLSA to implement section 13 (a)(1) of the Act contained a section entitled "Petition for amendment of regulations" which provided, in part, that:

> [I]n determining * * * future regulations, separate treatment for different industries and for different classes of employees may be given consideration.

This provision has remained a part of the regulations throughout their history. See 29 CFR 541.6 (1991). The

Department has always had authority under these regulations to consider separate treatment of the public sector.

In light of the court decisions and representations by affected parties, the Department has determined that strictly applying all aspects of the salary basis rule to the public sector under section 13(a)(1) has produced results that do not effectuate the intended purposes of the Act. The Department considers it inconsistent with Congressional intent and inappropriate that the exemption be denied in the public sector to virtually all employees solely because their pay is subject to deduction for partial day absences where paid leave is not used, pursuant to pay systems that were established according to principles of public accountability, and, in some cases, imposed by law, ordinance or regulation, even before Congress extended the Act's coverage to the public sector. As a result, the Department has determined that these specific elments of the "salary basis" test are not valid indicators in the public sector of the bona fides of a claimed exemption under section 13(a)(1), and the revisions herein are necessary in order to give effect to the statutory exemption in the public sector as intended by Congress under the 1974 Amendments.

It is important to note that public pay systems, in many cases are the result of requirements in State constitutions and statutes, civil service systems, city charters and ordinances, or regulations. Even if it were procedurally possible to change personnel policies through amendments to constitutions and charters and the repeal of all applicable laws and ordinances, it appears to the Department that the changes in public policy and tradition required for governments to conform to the Department's salary basis requirements, as interpreted by the Abshire court, are not consisent with the public accountability principles supported and required by the public. Thus, with respect

to AFSCME's suggestion that the regulations could have been revised to require an actual deduction in pay for the exemption to be lost, principles of public accountability embodied in the need to be accountable to the taxpayers for the expenditure of public funds only for hours actually worked require that the exemption criteria for the public sector take into account the fact that the pay systems at issue reduce pay for partial-day absences when leave is exhausted. As initially expressed in the preamble of the IFR, the Department's understanding that public sector employers necessarily must be held to a higher standard of accountability regarding the use of public funds in paying public employees was confirmed by the comments received during the rulemaking process. Consequently, to limit the rule to disallowing exemption in those workweeks that pay is reduced for absences not covered by available paid leave, as suggested, would simply not be responsive and would result in a rule that remains inadequate for appropriately distinguishing exempt from non-exepmt employees in the public sector.

* * * *

Comment: The "salary basis" test should be deleted for public sector employees.

Four commenters (City of Bellingham, WA; County of Fairfax, VA; Florida League of Cities; and Law Department, Salt Lake City, UT) suggested that the "salary basis" test should be deleted altogether, or made inapplicable as in Senate Bill S. 1670 (Seymour, CA), 102nd Cong., 1st Sess., or replaced with a minimum salary level, increased from present levels, above which the "salary basis" test would not apply.

The Department's IFR was narrowly drafted in response to a demonstrated need to specifically address the particular fact that the existing "salary basis" test in the

regulations produced inappropriate results when applied to public sector compensation systems which, based on principles of public accountability, reduce pay for partial-day absences for personal reasons or due to sickness or injury when leave is not used. All other requirements of the salary test were left unchanged as applied to employees in the public sector. Sufficient justification has not been shown in the comments to warrant eliminating altogether the "salary basis" requirement or making it inapplicable to public sector employees paid above some minimum "upset" salary level.

Comment: Revise the regulations to reflect differences in the nature of public sector jobs.

Several commenters (CA Department of Personnel Administration; International Personnel Management Association; National Association of State Personnel Executives; and University of California) suggested that the concept that public sector employment differs significantly from that of the private sector should be expanded to the duties and responsibilities tests, noting in particular the "administrative" employee exemption in § 541.2 and perceived difficulties in applying "production work" concepts to the modern work place typical of today's government employees. One commenter (Human Relations Department, Chatham County, GA) suggested the Department pursue an entirely separate set of regulations for the public sector. These comments do not address the "salary basis" subject matter of the current rulemaking and will have to be dealt with at a latter date when revisions to § 541.2 are considered and proposed for public comment.

* * * *

Comment: § 541.118(a)(5) regarding deductions for penalties imposed for infractions of safety rules of major significance should be broadened to include disciplinary suspensions of public sector employees.

Appendix C

Several commenters (Arnstein & Lehr on behalf of the City of Naperville, IL; County Attorney, Fulton County, GA; Fisher & Phillips) stated that disciplinary situations are unique in the public sector, particularly in organizations like police departments, or different from those of the private sector because public employees have less freedom to terminate employees absent extraordinary circumstances and thus must use disciplinary suspensions without pay to rehabilitate or control behavior; that public employers have virtually no other penalty options; and that suspension for a full week, which can be done without jeopardizing exempt status, is rarely imposed because of its severity. One commenter (County Attorney, Dade County, FL) suggested that disciplinary systems promulgated by statute, ordinance, administrative order, standard procedure, or collective bargaining should be treated in the same manner as the new regulation treats deductions for partial-day absences. One commenter (Fisher & Phillips) noted that such disciplinary systems were in place at the time of the Garcia decision and are premised on the concept that public employers should be accountable to the taxpayers for the conduct of public employees. Another commenter (City of Norfolk, VA) stated that failure to allow disciplinary deductions in the case of exempt employees could result in inconsistent application of discipline among exempt and non-exempt employees.

In the Department's judgment, the comments have not suggested a sufficient basis for distinguishing between the public and private sectors with respect to any recommended change in the rule. Although contrary assertions were made, the comments failed to demonstrate that public employers are significantly more restricted in the availability of options with respect to employee discipline than private employers. Although public employee terminations may require compliance with procedures designed to

protect employee rights, termination for disciplinary reasons is not generally unavailable. In addition, other remedies for disciplinary infractions, such as official reprimands, demotions, and reassignment or restriction of duties, are generally available and used in the public sector.

Section 541.118(a)(5) was not open for comment during the present rulemaking. However, the Department expects to consider this issue as appropriate in proposed revisions of Part 541 at a later date.

* * * *

Comment: Clarify the meaning of the phrase "workweek in which such deductions occurred" in § 541.5d(b).

One commenter questioned during which workweek a furloughed employee was to be treated as non-exempt—the week the furlough day was taken, the week the reduced pay check is received, or one of the weeks for which the pay check represents the employee's compensation? The exemption is lost in the workweek in which the furlough day is taken and for which the employee's pay is accordingly reduced. The language has been clarified in the final rule.

Comment: Clarify that all improper deductions result in loss of the exemption only for the particular employee docked and only in the workweek of the improper deductions.

One commenter (City of Chicago) suggested, in effect, that the new rule relating to furloughs be extended to any and all improper deductions so that the exemption would be lost only in the week(s) in which deduction(s) occur. Depending on the circumstances surrounding the impermissible deductions actually made, the suggested clarification would not be consistent with the existing provisions

at § 541.118(a)(6) which hold that the effect of making a deduction which is not permitted will depend upon the facts in the particular case. The Department considers the suggested change to be a significant departure from long-standing policy that is not substantiated by comment. Nor has any basis been presented to give special treatment in this regard to the public sector. It has. therefore, not been adopted in the final rule.

Comment: Include situations where the employee does not have permission to use available leave credits.

One commenter (Director of the Budget, State of New York) made the observation that negotiated agreements often require employees to obtain the employer's approval to be absent from work and be eligible to apply leave credit to be paid for the absence. Apparently, if the absence is unauthorized under such agreements, the employee is denied the use of leave credits and pay is reduced.

If advance approval of an absence is required under the terms of the employer's leave policy and is not sought or is sought and denied in a particular instance, leave availability for such employee is no different than when leave has been "exhausted." The commenter's recommendation that language be added to address this condition has been adopted. and the final regulation has been clarified in this regard.

* * * *

Comment: Allow deductions for periods of illness or injury of one or more workdays regardless of whether there is a leave plan.

One commenter expressed concern that some small public employers have no sick-leave plans, and, thus, would not be able to deduct for absences of one or more days for illness or injury under § 541.118(a)(3) without losing

eligibility for the exemption. or would have to adopt a minimal plan to satisfy the test for *bona fide* plan, policy or practice in order to permit such deductions without losing such eligibility. This problem arises for the public employer whose pay system requires deductions for any time not worked, but which does not have any kind of plan for compensating employees for lost time due to sickness or injury and which is located in a State that does not require a disability insurance plan. According to opinions issued over the years by the Wage and Hour Administrator, the plan that an employer would have to adopt to preserve exempt status for its employees can be simple and need not be particularly generous, so long as it is impartially allocated to the affected employees. In this regard, there is no requirement in § 541.118(a)(3) for any specific amount of leave to be stated under such plans, thus allowing considerable flexibility under the regulations.

* * * *

Comment: Delete the phrase "* * * (because the leave has been exhausted or by the employee's choice) * * *"

One commenter stated that this phrase is under-inclusive in that it does not take into account the practice of docking an employee's pay for being absent without leave (AWOL) for less than a day. The commenter suggested deleting the phrase. This concern has been addressed in the final rule with respect to the change made regarding systems that require employees to obtain advance permission to be eligible to utilize leave to be paid for absences.

Comment: Clarify the phrase "* * * requires the employee's pay to be reduced * * *"

One commenter observed that this phrase may be interpreted to exclude a public pay system where the prac-

tice of docking pay is, to any degree, *discretionary* with the public employer. This commenter suggested that the regulations be revised to read "* * * the public employee's pay can be reduced * * *"

The regulation protects public sector employers from a finding of non-exempt status solely because their pay system requires deductions from pay when leave is not used for the reasons stated in the regulations. If a deduction from pay (or the decision not to deduct) is based purely on the employer's discretionary choice, compensation would be "subject to deduction" for a reason other than that specified in the IFR. The change suggested by the commenter would broaden the exemption to include all deduction practices, whether or not required by the pay system, and whether or not mandatory or discretionary. We do not believe that this suggestion is consistent with the underlying justification for initiating the rulemaking, i.e., that principles of public accountability require that public sector employees not be paid for hours not worked that are not otherwise covered by an entitlement agreement, such as paid leave.

Comment: Delete the clause "* * * for personal reasons or because of illness or injury * * *".

One commenter proposed that this clause be deleted because it, too, would narrow the permissible reasons for docking pay for AWOL absences of less than a day. As previously discussed, AWOL absences have been addressed in the final rule, which treats unauthorized absences in the same manner as instances where leave is not available because it has been exhausted.

Comment: Clarify the status of leave deductions.

Several commenters (AFT; the cities of Alhambra and San Jose, CA, and Norfolk, VA; SEIU; UAW) observed

that the rule referred to pay deductions only and was silent on the isue of whether deductions from paid leave accounts for partial-day absences can affect the determination of salaried status. Under the terms of this regulation, deductions from either accrued leave or pay when leave is not used for the reasons stated, will not disqualify an employee from being paid "on a salary basis." It is the Department's position that an employer can require an employee to substitute paid leave for absences of less than a day without losing the exemption for that week because, in such circumstances, the employee does not experience a deduction from pay.

* * * *

List of Subjects in 29 CFR Part 541

Labor, Minimum wages, Overtime pay, Salaries, Teachers, Wages.

Accordingly, part 541 of title 29 of the Code of Federal Regulations is amended as set forth below.

Signed at Washington, DC, on this 14th day of August 1992.

Lynn Martin,
Secretary of Labor

Cari M. Dominguez,
Assistant Secretary for Employment Standards.

Karen R. Keesling,

Acting Administrator, Wage and Hour Division.

PART 541—DEFINING AND DELIMITING THE TERMS "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY (INCLUDING

Appendix C

ANY EMPLOYEE EMPLOYED IN THE CAPACITY OF ACADEMIC ADMINISTRATIVE PERSONNEL OR TEACHER IN ELEMENTARY OR SECONDARY SCHOOLS), OR IN THE CAPACITY OF OUTSIDE SALESMAN"

1. The authority citation for part 541 is revised to read as follows:

Authority: 29 U.S.C. 213: Pub. L. 101-583, 104 Stat. 2871; Reorganization Plan No. 6 of 1950 (3 CFR, 1945-53 Comp., p. 1004); Secretary's Order No. 13-71 (36 FR 8755).

2. Section 541.5d of subpart A of part 541 is revised to read as follows:

§ 541.5d Special provisions applicable to employees of public agencies.

(a) An employee of a public agency who otherwise meets the requirement of § 541.118 shall not be disqualified from exemption under §§ 541.1, 541.2, or 541.3 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because—

(1) permission for its use has not been sought or has been sought and denied;

(2) accrued leave has been exhausted; or

(3) the employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid "on a salary basis" *except* in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

[FR Doc. 92-19878 Filed 8-18-92; 8:45 a.m.]

APPENDIX D — DEPARTMENT OF LABOR LETTER RULINGS

Letter Ruling: February 16, 1988 (no number assigned)

This is in further response to your letters requesting an opinion as to whether the minimum wage and overtime pay exemption contained in section 13(a)(1) of the Fair Labor Standards Act (FLSA) is applicable to Juvenile Probation Officers (JPOs) and Adult Probation officers (APOs) employed by the Department of Court Services (the Department), _____. You ask if these employees, as described in your letter, qualify for exemption either as bona fide administrative or professional employees. We regret the delay in responding to your inquiries.

The FLSA is the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employee be paid not less than the minimum wage of $3.35 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

JPOs and APOs are required to have baccalaureate degrees. In order to achieve certification and maintain their status, JPOs and APOs must attend _____ State University to participate in a 40-hour training course during their first year, and a 24-hour training course in each of the next four years. The beginning salary for JPOs and APOs is $17,000 per year.

JPO

The primary duty of a JPO is to perform the responsibilities of the job in conformance with the management policies and procedures of the Department, and to adhere to the mandates of the court and Juvenile Court Act of _____. Some of the

responsibilities include: emergency juvenile intake after hours or on weekends; deciding on an individual basis whether detention is appropriate, and arranging for such detention; and determining if a notice to appear should be issued for juvenile intake at the probation office, or if referral should be made to another agency, or if further action is unnecessary. The JPO conducts social history investigations, prepares periodic reports for the court, prepares revocation reports, develops and manages supervision plans regarding the probationers, enforces the conditions of probation, and maintains a cooperative working relationship with service agencies and other available resources. The JPO must comply with directives from his or her immediate supervisor.

APO

The primary duty of an APO is to perform the responsibilities of the job in conformance with the management policies and procedures of the Department, and to adhere to the mandates of the court and the _____ Revised Statutes, Chapter 38, sections 204-1 through 204-8. Some of the responsibilities include: preparing pre-sentence reports for the court, providing broker services to community and social agencies, counseling of offenders and their families, arresting probationers who are in violation of court or probation orders, and arranging for adult probation orientation programs and the attendance of the probationers. The APO is responsible for monitoring compliance with court orders by offenders on probation or under court supervision, for investigating the offenders' backgrounds, and for coordinating the services for the offenders between the court and the probation and treatment agencies. The APO is responsible for selecting suitable work, assigning the probationers, and monitoring the probationers' job performance. The APO also maintains a cooperative working relationship with

all service agencies, police departments, and other available resources. The APO maintains accurate case records and required statistics. The APO complies with all directives from his or her immediate supervisor.

Section 13(a)(1) of FLSA provides a minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in Regulations, 29 CFR Part 541. An employee may qualify for exemption as a bona fide administrative employee if all of the pertinent tests relating to duties, responsibilities, and salary, as discussed in section 541.2, are met. Pursuant to section 541.2(e)(2), an employee who is paid on a salary or fee basis of at least $250 per week may qualify for exemption as a bona fide administrative employee if the employee's primary duty consists of the performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers, which include work requiring the exercise of discretion and independent judgement.

In determining whether activities are "directly related to management policies or general business operations" of the employer, it is important to consider the nature of the "business" itself, or in this case, the function of the government agency in question. Inasmuch as the Department has as one of its functions the providing of probation services, the probation activities performed by the JPOs and APOs would appear to be related more to the ongoing day-to-day "production" operations of the Department than to management policies or "general business operations". Therefore, it is our opinion on the basis of the information you provide, that the employees employed as JPOs and APOs cannot qualify as bona fide administrative employees under section 541.2 of the regulations.

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An employee may qualify for exemption as a bona fide professional employee if all of the pertinent tests relating to duties, responsibilities, and salary, as discussed in section 541.3 of the regulations, are met. An employee who is compensated on a salary or fee basis at a rate of not less than $250 per week may qualify for exemption as a bona fide professional employee if his or her primary duty consists of the performance of work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from training in the performance of routine mental, manual, or physical processes, which includes work requiring the consistent exercise of discretion and judgment. Based on the information you provide, it is our opinion that the duties performed by the employees you have in mind do not require the knowledge needed for exemption as a bona fide professional employee. Therefore, the employees employed as JPOs and APOs cannot qualify as bona fide professional employees under section 541.3 of the regulations.

We trust that the above is responsive to your inquiry.

/s/ Paula V. Smith
Administrator

* * * * * * * * * * * * * *

Letter Ruling: April 12, 1988 (no number assigned)

This is in further response to your letter requesting an opinion as to whether the minimum wage and overtime pay exemption contained in Section 13(a)(1) of the Fair Labor Standards Act (FLSA) is applicable to the probation officers

employed by the _____ Counties Adult Probation Office and by the _____ County Juvenile Probation Department. These agencies are established by State law and supervised by State agencies. You ask if these probation officers, as described in your letter, qualify for exemption as bona fide executive, administrative or professional employees. We regret the delay in responding to your inquiry.

The _____ County Juvenile Probation officers manage caseloads of Court related juvenile offenders, prepare and act upon treatment plans for each child and counsel juveniles and their parents. In order to be appointed as a probation officer, a person must have a bachelor's degree. No major area of study is specified. One year of experience or twenty-four post-graduate credit hours in specified courses of study are also listed as a minimum standard for employment, although this standard may be waived if no person meeting this requirement can be located. Although you sent only the job description for a _____ County Juvenile Probation Officer, you indicate that the position of Adult Probation Officer is very similar. We trust that the following discussion will also serve to provide guidance in the application of Section 13(a)(1) to the Adult Probation Officers.

The FLSA is the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the minimum wage of $3.35 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

Section 13(a)(1) of FLSA provides a minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those

terms are defined in Regulations, 29 CFR Part 541. An employee may qualify for exemption as a bona fide executive employee if all of the pertinent tests relating to duties, responsibilities and salary, is discussed in section 541.1 of the regulations, are met. An employee who is compensated on a salary or fee basis at a rate of not less than $250 per week may qualify for exemption as a bona fide executive employee if his or her primary duty consists of the management of the enterprise in which the employee is employed or a customarily recognized department or subdivision thereof and the customary and regular direction of the work of two or more full-time employees. Based on the information you provide, it is our opinion that the Juvenile Probation Officer cannot qualify as a bona fide executive employee under section 541.1 of the regulations.

An employee may qualify for exemption as a bona fide administrative employee if all of the pertinent tests relating to duties, responsibilities, and salary, as discussed in section 541.2, are met. Pursuant to section 541.2(e)(2), an employee who is paid on a salary or fee basis of at least $250 per week may qualify for exemption as a bona fide administrative employee if the employee's primary duty consists of the performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers, which includes work requiring the exercise of discretion and independent judgement. In determining whether activities are "directly related to management policies or general business operations" of the employer, it is important to consider the nature of the "business" itself, or in this case, the function of the government agency in question. Inasmuch as the Department has as its primary function the providing of probation services, the activities performed by the Juvenile Probation Officers would appear to be related more to the ongoing day-to-day

"production" operations of the Department than to management policies or "general business operations". Therefore, it is our opinion on the basis of the information you provide, that the employees employed as Juvenile Probation Officers cannot qualify as bona fide administrative employees under section 541.2 of the regulations.

An employee may qualify for exemption as a bona fide professional employee if all of the pertinent tests relating to duties, responsibilities, and salary, as discussed in section 541.3 of the regulations, are met. An employee who is compensated on a salary or fee basis at a rate of not less than $250 per week may qualify for exemption as bona fide professional employee if his or her primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from training in the performance of routine mental, manual, or physical processes, which includes work requiring the consistent exercise of discretion and judgment. Based on the information you provide, it is our opinion that the duties performed by the employees you have in mind do not require the knowledge needed for exemption as bona fide professional employees. Therefore, the employees employed as Juvenile Probation Officers cannot qualify as bona fide professional employees under section 541.3 of the regulations.

We trust that the above is responsive to your inquiry.

/s/ Paula V. Smith
Administrator

* * * * * * * * * * * * * *

Appendix D

Letter Ruling: May 9, 1988 (no number assigned)

This is in reply to your letter requesting an opinion as to the application of section 13(a)(1) of the Fair Labor Standards Act (FLSA) to employees employed by the State of _____ in the job classification of Child Protective Investigator II. You specifically ask if these employees would qualify for the minimum wage and overtime pay exemption contained in section 13(a)(1) of FLSA for bona fide professional employees, as that term is defined in section 541.3 of Regulations. 29 CFR Part 541. We regret the delay in responding to your inquiry.

You state that an academic degree is normally required for this position, but some incumbents who do not possess a degree were found to qualify for the position on the basis of their training and experience. You say they perform the same duties as other employees within the job classification, and perform work that is predominately intellectual and varied in character as opposed to routine mental, mechanical, or physical work. You also state that we are to assume that the salary requirements for exemption as a bona fide professional employee are met. We understand that all employees employed as a Child Protective Investigator II are paid on a salary basis of at least $250 per week.

The FLSA is the federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the minimum wage of $3.35 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek. The provisions of FLSA as they apply to State and local government employees, are contained in Regulations, 29 CFR Part 333, a copy of which is enclosed.

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Section 13(a)(1) of FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in Regulations, Part 541, a copy of which is enclosed. An employee may qualify for exemption as a bona fide professional employee if all of the pertinent tests relating to duties, responsibilities, and salary, as discussed in section 541.3 of the regulations, are met. One such test for exemption requires that a bona fide professional employee have as his or her primary duty work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship and from training in the performance of routine mental, manual, or physical processes.

The term "professional" is limited to those professions which have a recognized status and which are based on the acquisition of professional knowledge acquired through prolonged intellectual instruction and study. The typical symbol of professional training and the best prima facie evidence of its possession is the appropriate academic degree, and in the professions a baccalaureate degree is a standard prerequisite. A "prolonged course of . . . study" has generally been defined to mean a baccalaureate degree or its equivalent which includes a longer intellectual discipline in a particular course of study, as distinguished from a general academic course of study otherwise required for a baccalaureate degree. From the information you provide, it is our opinion that the position of Child Protective Investigator II does not require knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and

study, as contemplated by the regulations. Therefore, an employee employed as a Child Protective Investigator II would not qualify for exemption as a bona fide professional employee, as defined in section 541.3 of the regulations.

In addition, we have considered the question of whether the employee you have in mind may qualify for exemption as bona fide administrative employee, as defined in section 541.2 of the regulations. An employee may qualify for exemption as a bona fide administrative employee if all of the pertinent tests relating to duties, responsibilities, and salary as discussed in section 541.2, are met. Pursuant to section 541.2(e)(2), an employee who is paid on a salary or fee basis of at least $250 per week may qualify for exemption as a bona fide administrative employee if the employee's primary duty consists of the performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers, which includes work requiring the exercise of discretion and independent judgement.

In determining whether activities are "directly related to management policies or general business operations" of the employer, it is important to consider the nature of the "business" itself, or in this case, the function of the government agency in question. Inasmuch as the Department of Children and Family Services has the protection of children as a primary function, the activities performed by a Child Protective Investigator II appear to be related more to the ongoing day-to-day "production" operations of the department than to management policies or "general business operations." It is therefore our opinion on the basis of the information you provided that the Child Investigator II cannot qualify for exemption as a bona fide administrative employee within the meaning of section 13(a)(1) of FLSA and section 541.2 of the regulations.

Appendix D

We trust that this is responsive to your inquiry.

/s/ Paula V. Smith
Administrator

95-1509

No. _____

Supreme Court, U.S.
FILED
APR 19 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

DOUGLAS W. LUZIK, *et al.*,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The Virginia Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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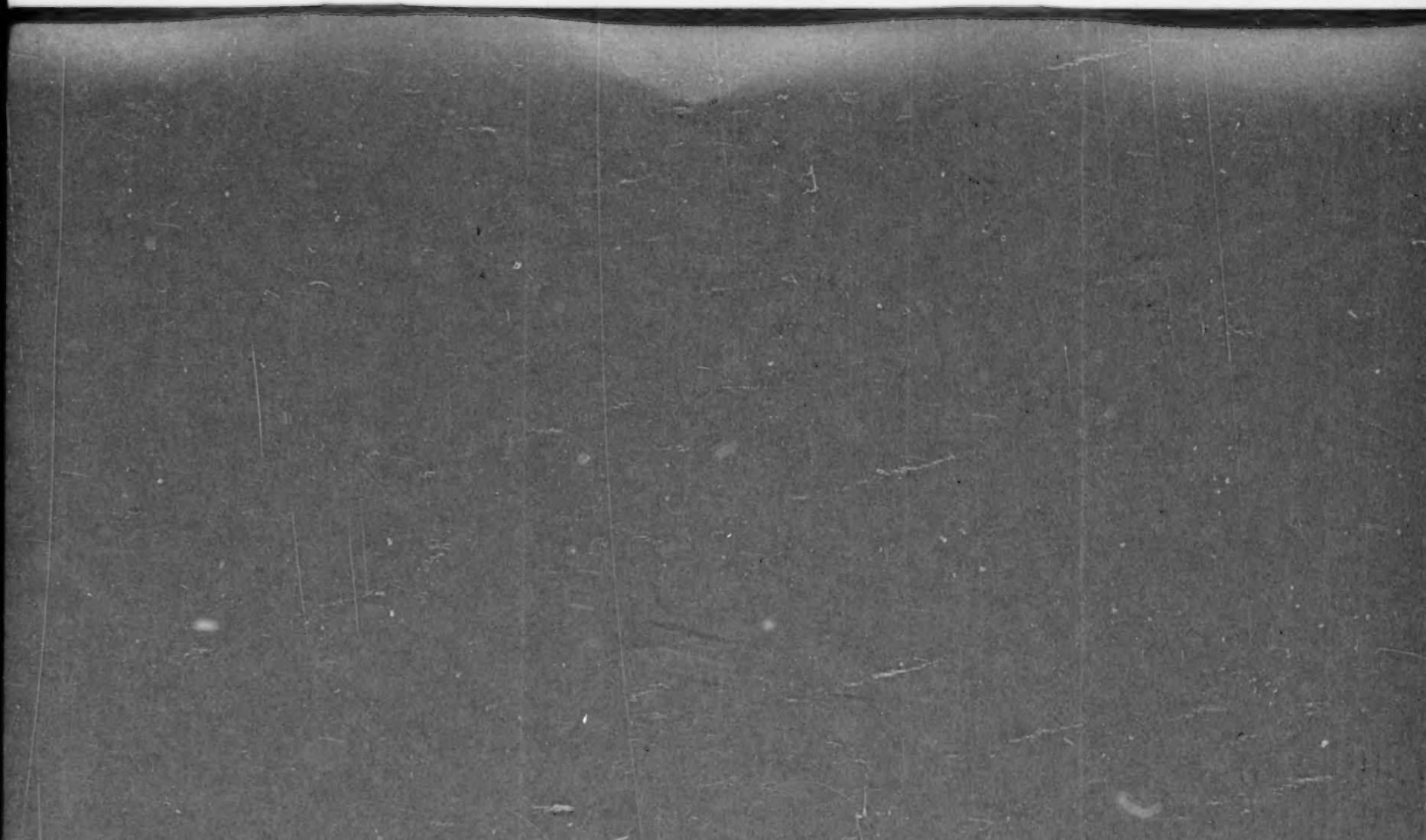

QUESTIONS PRESENTED

I. Whether this Court should grant certiorari in this case to resolve a split in the Federal Circuits on the issue of disciplinary deductions under the salary basis test, when the facts and findings in the instant case do not lend themselves to resolving that issue.

II. Whether this Court should grant certiorari in this case where the trial court correctly applied the law regarding the "administrative" exemption to facts unique to this case, and unique to Virginia.

III. Whether this Court should grant certiorari in this case where the trial court correctly applied the law regarding the "professional" exemption to facts unique to this case, and unique to Virginia.

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STATEMENT OF THE CASE

This was a chancery action for an accounting, brought in Virginia Circuit Court, on behalf of 103 juvenile probation officers ("JPOs"). They asserted that the Commonwealth failed to pay them additional compensation beyond their base salary for hours that they had worked in excess of 40 in any given week, thereby violating the Fair Labor Standards Act ("FLSA" or "the Act"). 29 U.S.C. § 541. The case proceeded to trial on November 21 and 23, 1994.

The trial court's May 5, 1995, letter opinion succinctly sets out most, but not all, of the salient facts. In relevant part, the trial court found that: the work of the JPOs constitutes an application of Juvenile & Domestic Relations District Courts' ("juvenile courts") policies, and is of substantial importance to the court system and the juveniles who come into contact with it (App. 9a); every decision the JPOs make is an implementation of the juvenile court's policies (App. 9a); the JPO's duties impact on the courts' dockets and help expedite the functioning of the juvenile justice system (App. 9a); "running" a court's business "is essentially docket management and case resolution" (App. 9a); and each petitioner is critical to docket management. (App. 9a).

In addition, the court also found that: the work JPOs perform is "predominately intellectual and varied in character" (App. 11a); they must be able to analyze and interpret information (App. 11a); the JPO is constantly presented with different facts and circumstances that must be weighed to assess and make recommendations (App. 11a-12a); in order to do their job, JPOs must have

knowledge of subjects such as normal and abnormal psychology, child development, sociology, child delinquency and the Virginia Code (App. 12a); all the JPOs here hold college degrees, and 88% of their degrees are in a related social science field (App. 12a); individuals with related degrees have a competitive edge over other applicants (App. 12a); and there is selective hiring of individuals with degrees in related fields for the position of JPO. (App. 12a).

The trial court also found that: none of the petitioners had received a reduction in pay of less than a full work week for a disciplinary suspension, of any kind (App. 5a & 6a); the only testimony regarding the duration and scope of any actual disciplinary deduction from pay for non-safety reasons was offered by Earl McFarland, a JPO who had been suspended in 1983 – this occurred at a time when the Act did not even apply to the states (App. 5a & 6a). Based on the evidence before it, the trial court concluded that "the fact the Commonwealth had a disciplinary rule in place that 'subjected' the juvenile probation officers to a potential pay reduction does not destroy their salaried status absent evidence that a reduction actually occurred." (App. 7a).

The "disciplinary rule" that the petitioners make much of here was never introduced into evidence and the primary witness called by petitioners to establish the existence of this policy testified that he was unaware how, if at all, the state's broad policy would have been

implemented by the JPOs' agency in question. (Res. App. 32, Vol. II, pp. 34-35).[1]

ARGUMENT

In a two-pronged argument, the JPOs argue that this Court should exercise jurisdiction of this case because the decision below adopts a broad reading of FLSA exemptions, thereby (1) intensifying a severe and confusing split among the Federal Circuits and States; and (2) erroneously applying federal law. The factual predicate for their first argument does not exist in the record below; the second argument is factually incorrect. For these reasons, this Court should not grant certiorari.

I. THIS CASE IS INAPPROPRIATE TO RESOLVE A SPLIT THAT MAY EXIST AMONG THE FEDERAL CIRCUIT COURTS OF APPEAL AND VIRGINIA

The petitioners' first argument is that the decision of the trial court contributes to a split in authority among the Federal Circuits, and as between those circuits and Virginia, regarding treatment of the "disciplinary rule" of the salary basis test; as well as a split on the requirements of the "administrative" and "professional" exemptions of the FLSA.

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[1] References to materials found in the Respondents' Appendix are marked as (Res. App. ___) and attached to this brief. References to pages of the trial transcript bear the additional citation to the volume and page of the transcript. (Res. App.___, Vol.___, pp.___).

A. The Salary Basis – Disciplinary Docking Rule Split

The federal courts admittedly have split as to whether so-called "theoretical" reductions in pay destroy the salary basis of an otherwise exempt employee.[2] As petitioners point out, the trial court below noted the split in authority. However, the trial court's finding, upon which petitioners rely to set up this issue, is a figment of their imagination. The finding in question only states:

> "[the] fact that the Commonwealth had a disciplinary rule in place that "subjected" the juvenile probation officers to a potential pay reduction does not destroy their salaried status absent evidence that a reduction actually occurred."

(App. 7a). The trial court's findings never differentiated between a disciplinary rule that allowed deductions from pay for major safety violations, which would be authorized under the salary basis test, and a disciplinary rule that resulted in deductions for non-safety violations, which would not. The trial court made no findings or rulings on the type of deductions that could be imposed by the state's disciplinary policy. In fact, the trial court never specifically found that the "disciplinary rule" in question even potentially authorized an *improper* deduction for "non-safety" violations.

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[2] The cases that petitioners cite to demonstrate a split, not only deal with reductions in pay for less than a full work-week for non-safety rule violations, but also reductions in pay for periods of less than a full work day arising from absences by an employee for personal reasons.

At trial, the testimony of the Accounting Manager for the Department of Youth and Family Services ("DYFS") established that he had reviewed the actual records for each petitioner and determined that none had suffered *any* reduction in pay because they had been suspended from work for a period of less than a full work week. (App. 6a). Additionally, though petitioners attempted to have the Commonwealth's Compensation Director testify that JPOs might in theory be disciplined in a manner unauthorized by the FLSA, he testified that each agency implements policy guidelines that the Department of Personnel & Training establishes; he "just didn't know" whether any individual [JPOs] are, in point of fact, even theoretically subject to being disciplined by a suspension without pay. (Res. App. 32, Vol. II, pp. 34-35). In fact, the state policy alluded to, and to which petitioners attach such great emphasis as the offending "disciplinary rule," was never introduced at the trial of this cause.

Once the respondents fulfilled their burden of establishing that the petitioners met the salary basis test, it was up to the petitioners to establish the existence of an unauthorized deduction from pay, or, consistent with the theoretical deduction cases, a policy permitting an unauthorized deduction. The only testimony at trial that any deduction had been made came from the petitioner Earl McFarland who had been suspended in 1983. This occurred, however, 11 years prior to trial when the Act did not apply to the states (App. 5a & 6a);[3] and at a time when the Department of Youth and Family Services had

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[3] *See Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985).

not yet been established. (Res. App. 29, Vol. II, p. 122); *See also* Va. Code § 66-1. Based on the evidence before it, the trial court reasonably concluded that the respondents had met their burden under the salary basis test.

Even more significant, the court did not find, as petitioners urge, that the disciplinary rule at issue even subjected them to "a disciplinary reduction in pay *of less than one work week for a non-safety related infraction.*" Petitioners' Brief at 4. (Emphasis added). The trial court's ambiguous finding that the Commonwealth's disciplinary rule "subjected" the petitioners to a potential pay reduction, without more, cannot be bootstrapped into a ruling that warrants review by this Court in order to resolve any "split in authority" among the Federal Circuits on this issue.[4]

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[4] The petitioners appear to raise another issue in their brief. That issue relates to the docking of pay of an employee for their attendance at trial as a witness. *See* Question Presented No. 1, Page i, and Page 9 of Petitioners' Brief. This matter came up in the trial court when Douglas Luzik, the lead petitioner in this case, chose to attend the trial of this cause in his capacity as a party. Petitioners seem to suggest, without more, that this is unauthorized under the FLSA, and constitutes grounds for this Court's review. We note that the trial court held that Mr. Luzik "had enough annual leave to cover his absence." (App. 7a); *See also Shockley v. City of Newport News*, 997 F.2d 18, 24 (4th Cir. 1993). Respondents believe that petitioners appear to have relinquished this issue by failing to cite to any facts showing an unauthorized docking, nor citing any authority to support such a claim.

B. The Juvenile Probation Officer Administrative Exemption Split

The petitioners attempt to paint the decision of the trial court, determining that these JPOs were administratively exempt, as an aberration. They contend the decision is in conflict with decisions from other courts dealing with juvenile probation officers and in conflict with Department of Labor (DOL) rulings.

As this case amply demonstrates, however, a determination whether a particular job qualifies for one of the exemptions is a very fact specific inquiry. Unfortunately for the petitioners, the trial court decided the facts adversely to them.

Petitioners argue that this Court should simply borrow the rulings finding probation officers not administratively exempt in *Bratt v. County of Los Angeles*, 912 F.2d 1066 (9th Cir. 1990), *cert. denied*, 498 U.S. 1086 (1991), and *Jones and Associates, Inc. v. District of Columbia*, 642 A. 2d 130, 134 (D.C.App. 1994). Failure to do so, they argue, results in a split in authority and pits the Virginia courts against other jurisdictions. *Bratt* and *Jones and Associates, Inc.*, however, involved different employees, with dissimilar duties, in different locales, following different state laws and policies.[5] Significantly, the *Bratt* court

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[5] Petitioners engage in hyperbole when they suggest that the trial court's decision here rejects the legal holdings in *Shockley*, *Bratt*, and *Jones and Associates, Inc.*, and is binding on every other Circuit Court in Virginia that considers an FLSA claim. The fact driven decision here has little binding precedential value on other judges in the Circuit Court of the City of Richmond, let alone on other Circuit Courts across the Commonwealth.

characterized the Los Angeles probation officers as mere "information gatherers" – supposedly all they did was conduct factual investigations and make recommendations. *Id.* at 1069. The evidence in this case was far different.

This case is also distinguishable from *Bratt* and *Jones and Associates, Inc.* because of the applicability of several sections of the Code of Virginia to the instant case. These provisions help to instruct that JPOs meet the administrative exemption. Pursuant to Va. Code § 16.1-233,

> Within funds appropriated for the purpose, it shall be a function of the Department to develop and operate . . . probation and other court services **for juvenile and domestic relations district courts**. . . . (Emphasis added).

Similarly, Va. Code § 16.1-235 provides that "The Department shall develop and operate probation and related court services. . . . **and make such services available to juvenile and domestic relations district courts** . . . (Emphasis added). *See also* Va. Code §§ 16.1-234; 16.1-233(d). These statutes clearly show that the petitioners provide their services directly to the courts, and only indirectly to those juveniles and families coming before the courts.

Petitioners also cite to the DOL's opinion letters of February 16, 1988 (App. 63a-66a), April 12, 1988 (App. 66a-69a), and May 9, 1988 (App. 70a-73a), finding that juvenile and adult probation officers of certain unidentified public employers did not qualify for exemption as

administrative employees.[6] This Court cannot gain any insight, however, by looking to a letter opinion which does not follow from a set of facts unique to Virginia. Moreover, this Court has previously held that opinion letters issued under the FLSA are not "conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy." *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944). Further, opinion letters are not binding on the courts. *Schultz v. Hartin & Son*, 428 F.2d 186, 191 (4th Cir. 1970). Even DOL cannot reach consistent results given the many configurations of employment duties. In an earlier opinion letter, issued on October 8, 1974, DOL opined that deputy probation officers **were exempt** as administrative employees. (Res. App. 33). Contradictory opinions illustrate all the more reason why the DOL letters petitioners cite are not controlling.

The JPOs here impact directly on the court's management of its docket and the policies it establishes to conduct its business. Neither of these conclusions can be gleaned from the decisions in the cases cited by petitioners. The ruling in the trial court was a fact driven determination that the petitioners were administratively exempt. The evidence clearly justified such a conclusion. Petitioners' assertion that the instant case was decided in the face of contrary decisions and rulings, and therefore creates a split of authority on this issue is plainly inaccurate. The trial court made a determination against the

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[6] The May 9, 1988, letter cited by petitioners, deals with a "Child Protective Investigator II." The job requirements and duties there are totally different from the instant case.

petitioners. Petitioners cannot elevate this decision beyond its facts to warrant review by this Court.

C. The Professional Exemption Split

Petitioners open their argument on this issue by commenting that "Judge Markow is the first judge to ever rule that being a juvenile probation officer in a position which does not require any college degree is a profession. . . . " Petitioners' comment is premised on the contention that the respondents did not have any "formal" requirement of a degree for an individual to be hired as a JPO.[7] What petitioners fail to mention, however, is that every petitioner here had a degree, and that 88% of them had degrees in a related field of social science. (App. 12a). In addition, the respondents presented testimony from the Employment Manager for DYFS that all but one of the petitioners had related "experience" in addition to a degree at the time they were hired.[8]

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[7] Significantly, the petitioners' position descriptions introduced at trial concede the necessity of a specialized degree. In response to the question, "List what you consider to be the qualifications for entry into this position," the petitioners typically acknowledged in Part III, Section 18, Sub-Section C, that a degree in human services, social sciences, criminal justice or related fields was required. Petitioners cannot now contend that DYFS does not have such a requirement.

[8] The Employment Manager could not provide further information about the one exception, because the individual's personnel file was incomplete and the local director who had hired the individual was deceased. (Res. App. 29-30, Vol. II, p. 123).

Petitioners, in seeking to create another "split" to justify review here, take pains to ignore the DOL regulations that guided the trial court's inquiry. Those regulations state that exempt "professional" employees include those in traditional professions such as law and medicine, as well as those in "various types of physical . . . and biological sciences." 29 C.F.R. § 541.302. Computer analysts, programmers, and software engineers are similarly exempt professionals. *Id.* at § 541.303. Whereas an appropriate academic degree is *prima facie* evidence of the possession of professional training, an advanced degree is not a prerequisite for this exemption to apply. *Id.* at § 541.302(d). The employees' actual duties and qualifications determine the exemption, rather than the mere holding of a professional title. *Id.* at § 541.304(a). The regulations define knowledge of an "advanced type" as that which cannot be obtained at the high school level. *Id.* at § 541.302(b).

DOL regulations further define what type of work qualifies for the professional exemption. It must be work that is "predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work." *Id.* at § 541.306(a). The employee must not only take information, he or she must interpret the data. *Id.* Finally, "the areas in which professional exemptions may be available are expanding as knowledge is developed, academic training is broadened, and degrees are offered in new and diverse fields." *Id.* at § 541.302(e)(2).

Petitioners cite to three cases from foreign jurisdictions to try and prove the point that "probation officers" cannot be professionals, and to establish a "split" in

authority. *Dybach v. Fla. Dep't of Corr.*, 942 F.2d 1562 (11th Cir. 1991); *Mills v. Maine*, 839 F. Supp. 3 (D. Maine 1993); and *McIntyre v. Youth Rehabilitation Services*, 795 F. Supp. 668 (D.Del. 1993). *Dybach* and *Mills* are contradictory, and *McIntyre* simply has no application here.[9] In *Dybach* the court found that a Bachelor of Arts in criminal justice constituted a "specialized field." *Dybach* at 1565. The court noted, however, that the personnel director for the Department of Corrections testified that the position could have been filled by someone with a degree "in basket weaving." *Id.* at 1565. In addition, the particular job duties the plaintiff was performing demonstrated that she was not employed in a professional "capacity." *Id.* at 1565. On the other hand, in *Mills* the court found such a degree insufficient. Again, it is clear that the primary responsibilities of the probation officers in the cited cases were significantly different from those exercised by the petitioners here.

Petitioners totally ignore the one Federal case that is most similar to this one, and which is totally consistent with the trial court's conclusion. That decision – a case petitioners' own counsel litigated – is the Alexandria, Virginia federal court decision in *Hicks v. City of Alexandria*, C/A No. 92-354-A (E.D. Va., March 31, 1993).[10] *Hicks* is important because the court there found that Alexandria's Social Workers I and II qualified as "professionals." The *Hicks* court found that Alexandria's Social

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[9] *McIntyre* deals with a probation officer and on-call duties, not with the requirements for the professional exemption.

[10] The *Hicks* Opinion is unreported and is reproduced and attached to this Brief at Res. App. 1-28.

Workers were required to have advanced knowledge and training in the social sciences. The *Hicks* evidence showed that Social Worker IIs require a "knowledge of normal and abnormal psychology, child development, mental retardation, social problems, therapeutic treatment techniques, alcoholism, child delinquency, drug addiction, theories of human behavior, knowledge of group behavior and knowledge of literature in the field of social work." *Hicks, slip op.* (Res. App. 24).

The *Hicks* court also found that since August of 1990, Alexandria had required that any newly hired Social Worker possess a baccalaureate degree in the field of Human Services, **or a baccalaureate degree in any field plus a minimum of two years experience in an area related to Human Services**. Of the six plaintiff Social Workers in that case, all but one had such a degree. The sole exception had other relevant experience. *Hicks, slip op.* (Res. App. 25).

Finally, the *Hicks* court determined that Alexandria's Social Workers were engaged in such duties as "providing counseling and therapy to individuals and families, providing social assessments, crisis intervention. . . . " *Hicks, slip op.* (Res. App. 23).

At trial in the instant case, the Director of the Alexandria Court Services Unit, of which Douglas Luzik and several other petitioners were employees, testified that Alexandria's Social Workers perform fundamentally the same type of work, and have the same type of knowledge and background as her JPOs. (Res. App. 30-32, Vol. III, p. 148-150). The trial court here specifically found that each

of the JPOs required knowledge of several areas, including normal and abnormal psychology, child development, sociology, child delinquency, and the Virginia Code. (App. 12a).

Despite petitioners' recitation of things the trial court did not find, the record is replete with evidence establishing that JPOs qualify as professionally exempt. Petitioners are once again seeking to leverage a purely fact intensive inquiry and decision by the trial court into a split of authority. The evidence clearly does not establish that to be the case here, and should not form the basis for this Court's review of the decision.

In conclusion, contrary to the suggestion of the petitioners, certiorari review of this decision would not likely resolve any split in the Federal Circuits, nor resolve any "manufactured" split in the application of FLSA principles by the courts of Virginia and other courts.

II. THE DECISION BELOW DOES NOT CONTAIN ERRONEOUS INTERPRETATIONS OF IMPORTANT QUESTIONS OF FEDERAL LAW

The petitioners' second principal argument is that the decision of the trial court is erroneous in its interpretation of the disciplinary rule of the salary basis test, as well as in its treatment of the requirements of the administrative and professional exemptions to the FLSA.

A. Disciplinary Docking: Subject v. Actual

The petitioners contend that the trial court misinterpreted the requirements of the disciplinary rule. Petitioners contend that the court should have adopted the DOL's interpretation of the rule. Petitioners argue that since a disciplinary rule was in effect in the instant case, petitioners' compensation was "subject to" deductions, and therefore respondents failed the salary basis test.

Petitioners, however, mistake the trial court's application of the facts to the law in this case with a misinterpretation of the law. Petitioners once again take great pains to ignore the fact that they failed to meet their burden of proof. The disciplinary rule or policy that purportedly made the JPOs "subject to" deductions was never introduced at trial. Nor could petitioners' witness at trial state that it was even applied to petitioners. Further, the evidence established conclusively that no *unauthorized* deduction had been made of any JPOs' pay at a time when the FLSA applied to the Commonwealth of Virginia. Under the circumstances, the trial court could not have found a violation of the salary basis test. The trial court's ambiguous finding that a disciplinary rule existed that subjected the petitioners to a potential pay reduction, without more, does not give rise to a determination that unauthorized pay reductions could be made so as to defeat the salary basis test. This finding, and the court's application of the facts to the law, even assuming arguendo that it was improperly applied, does not justify review by this Court. Rule 10, Rules of United States Supreme Court.

B. Administrative Exemption: Day-To-Day Production Work

Petitioners also assert that the trial court interpreted the requirements of the administrative exemption too narrowly. They argue that the proper interpretation may be found in the *Bratt* and *Jones and Associates, Inc.* decisions as well as other rulings by the DOL.

Once again, the petitioners mistake the trial court's proper application of law to the facts with what they characterize as improper legal conclusions. That is just not right. The trial court rejected petitioners' narrowly framed analysis of the requirements of the administrative exemption in favor of one more reasonable and in conformity with the requirements of the DOL's regulations. The trial court reviewed the facts adduced at trial, considered all the applicable regulations, and determined that the petitioners' work qualified for the administrative exemption. (App. 8a-9a). That the facts of this case justified such a conclusion is clear. That the plaintiffs in *Bratt* and *Jones and Associates, Inc.* failed to muster sufficient evidence to fall within the exemption does not preclude such a finding in other cases such as this one. That the DOL has interpreted inconsistently on this issue simply confirms that different fact situations will produce different results. That this trial court correctly applied the law to the facts, but came to a different conclusion than one urged by the petitioners, does not elevate this case to one worthy of review on certiorari.

C. The Professional Exemption Prolonged Course of Specialized Intellectual Instruction and Study

Petitioners also assert that the trial court misinterpreted the requirements of the professional exemption. They argue that once again, the decision of the trial court is out of sync with other decisions. Once again, however, the respondents put on evidence at trial that the petitioners qualified for the exemption.

Petitioners imply that since one cannot obtain a degree in "probation counseling" these petitioners cannot be professionally exempt. This is simply incorrect. In *Martin v. State of Wyoming*, 770 F. Supp. 612 (D. Wyo. 1991), *aff'd*, *Reich v. State of Wyoming*, 993 F.2d 739 (10th Cir. 1993), for example, game wardens were found to be exempt under the professional exemption, despite the fact none of the wardens had degrees in "game wardening." Some did not even have a degree, but had relevant experience. 770 F. Supp. at 614. Many of the game wardens had acquired the knowledge necessary to perform their primary duty through academic study at the college level in such areas as " . . . wildlife management, wildlife biology or a closely related field. . . . " 770 F. Supp. at 614.

Of greatest significance, however, is the fact that the evidence at trial established that the petitioners do fundamentally the same jobs as their counterparts in the Alexandria Social Services Department. In the *Hicks* case, the federal court held the plaintiffs there to be professionally exempt. This was true even though all that Alexandria had required for any newly hired Social Worker was a baccalaureate degree in the field of Human Services, or a

baccalaureate degree in any field plus a minimum of two years experience in an area related to Human Services. In fact, one of the six plaintiff Social Workers in *Hicks* did not have such a degree, but had relevant experience instead. *Hicks, slip op.* (Res. App. 25). Here, all petitioners had college degrees, 88% of the petitioners had related degrees, and all had relevant experience. The trial court's decision in this case reflects a common sense application of the requirements of the professional exemption to the facts before it. Petitioners seek an altogether too narrow reading of the regulations. Nothing could be more illogical than to conclude that these petitioners, who have the same educational requirements and do the exact same work as the *Hicks* social workers, cannot also be deemed exempt professionals. Again, this case does not involve misinterpretation of the law. Rather, this is nothing more than a correct application of the law to the facts, and a judgment with which the petitioners disagree. This is not the type of case that warrants review by this Court.

CONCLUSION

For the reasons stated, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA, *et al.*,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

FRED M. HICKS, et al., Plaintiffs,	)	CIVIL ACTION NO. 92-354-A
v.	)	
CITY OF ALEXANDRIA, Defendant.	)	

MEMORANDUM OPINION

(Filed Mar. 31, 1993)

This is an action brought by thirty-three employees[1] of the City of Alexandria, Virginia ("City") pursuant to the Fair Labor Standards Act of 1938, 29 U.S.C. Section 201 *et. seq.*, as amended ("FLSA"). Plaintiffs seek declaratory, injunctive, and monetary relief, alleging that they are nonexempt employees under the FLSA and are thus entitled to overtime compensation for hours worked in excess of the statutory minimum. *See* 29 U.S.C. Section 207(k) (1992). The City denies liability, claiming that each of these employees is exempt from the overtime requirements of the FLSA pursuant to one of the executive, administrative, or professional exemptions enumerated in the statute. This matter is before the Court for determination of issues relating to liability.[2]

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[1] Twelve Plaintiffs settled their claims with the City of Alexandria prior to trial; thus, at the time of trial, twenty-one Plaintiffs remained.

[2] By order dated June 19, 1992, the liability and damage issues were bifurcated.

I. Background

The Fair Labor Standards Act was made applicable to state and local governments as a result of the United States Supreme Court's 1985 ruling in *Garcia v. San Antonio Metropolitan Transit Authority.*[3] The Act requires that employees be paid time and a half for work over forty hours a week, *see* 29 U.S.C.A. Section 207(a)(1) (1992), but exempts from that requirement "any employee employed in a *bona fide* executive, administrative, or professional capacity." *See id* Section 213(a)(1). To aid employers in classifying their workers, federal regulations provide certain tests, checklists of a sort, enumerating the characteristics of *bona fide* executive, administrative or professional employees who may qualify for exemptions from the statute's overtime requirements.

Subsequent to the *Garcia* decision, the City of Alexandria undertook an extensive study of all its job classifications. This study included a review of a large amount of data compiled from job specifications, employee job-analysis questionnaires, interviews with superintendents, and other sources. The result of the review was the reclassification of each job within the City's employment system as either "exempt" or "non-exempt" from the overtime provisions of the FLSA. Additionally, even after

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[3] 469 U.S. 528, 105 S. Ct. 1005, 83 L.Ed.2d 1016 (1985), *Overruling National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). With respect to state and local government employees, the effective date of FLSA coverage was April 15, 1986 (*See* FLSA amendments of 1985, Pub. Law No. 99-150, Section 2(c)).

the initial review and reclassification, certain job classifications have been reevaluated as a result of changed duties/responsibilities or requests from employees for status reviews.

This action is not the first to stem from the City's ongoing attempts to bring its personnel policies and regulations into conformity with the requirements of the FLSA. In 1989 a number of employees of the City's Fire and Police Departments petitioned this Court to examine their own job classifications to determine whether they had been properly classified as exempt from the FLSA overtime requirements. *See Firefighters Local 2141 v. Alexandria.*[4] In that case, the Court considered argument on many of the same issues presented in the case at hand, and determined certain contested job classifications to be non-exempt and other classifications to have been properly classified exempt. The Court also found that the City had taken sufficient action to begin revision of its administrative regulations, within the "window of opportunity" afforded by the FLSA and its regulations.[5]

The Plaintiffs in this action (the "Employees") are each employed in positions which have been classified by the City of Alexandria as exempt from the overtime provisions of the FLSA. The Employees challenge the classification of their jobs as exempt, claiming that they are not

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[4] 720 F.Supp. 1230 (E.D. Va. 1989), *aff'd* 912 F.2d 463 (4th Cir. 1990).

[5] *See id.* at 720 F.Supp. 1232 (*citing Harkins v. City of Chesapeake*, No. 88-25-N (E.D. Va., Dec. 2, 1988)).

compensated on a salary basis and that their job responsibilities do not meet the standards set forth in regulations implementing the FLSA.

To analyze the job classifications currently at issue, this Court will utilize what is known as the "Short Test" for determining eligibility for exempt status. *See* 29 C.F.R. Sections 541.1(f), 541.2(e)(2), and 541.3(e) (1992).[6] Under the Short Test, an individual qualifies as a *bona fide* executive, administrative, or professional employee if he or she is compensated on a salary basis, at a rate of not less than $250 per week ("Salary Basis Test"),[7] and his or her

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[6] There is also a "Long Test," which enumerates five analysis components; however, the Long Test is utilized in examining job classifications of employees who earn wages of not less than $155 per week. It is undisputed that each Employee earns at least $250 per week. Accordingly, the Regulations allow application of the abbreviated "Short Test" analysis in determining exempt status for certain classifications of employees. *See id* Sections 541.1, 541.2, and 541.3.

[7] With regard to the "salary basis" requirement the federal regulations provide, in part, that:

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to [specified] exceptions . . . , the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule

primary job responsibilities meet various requirements set forth in the regulations ("Primary Duties Test").[8] An

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> that an employee need not be paid for any workweek in which he performs no work.

29 C.F.R. Section 541.118(a) (1992).

The exceptions noted in the above regulation permit the following salary deductions:

> (1) for absences from work for a day or more for personal reasons, other than sickness or accident. *Id.* at Section 541.118(a)(2);
>
> (2) for absences of a day or more occasioned by sickness or disability . . . if the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for loss of salary occasioned by both sickness and disability. *Id.* Section at 541.118(a)(3); and
>
> (3) for infractions of safety rules of major significance. *Id.* at Section 541.118(a)(5).

Deductions may not be made for employee absences occasioned by jury duty, attendance in court proceedings as a witness, or for temporary military leave. *Id.* at Section 541.118(a)(4).

[8] An employee is considered to work in a bona fide managerial capacity if his primary duties consist of managing the enterprise in which he is employed (or a customarily recognized department or subdivision thereof) and he customarily directs the work of two or more other employees. *See* 29 C.F.R. Section 541.1(f). An employee is considered to work in a bona fide administrative capacity if his primary duties consist of office or non-manual work directly related to management policies or general business operations of the employer and he customarily and regularly exercises discretion and independent judgment. *Id.* at Section 541.2. An employee is considered employed in a bona fide professional capacity if his primary duties consist of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual

employer bears the burden of showing that an employee's job classification meets the requirements of both these analyses in order to prevail on the issue of exemptions. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974).

II. THE "SALARY BASIS REQUIREMENT"

The City claims that the Employees in this action are all paid on a "salary basis," but the Employees claim nonsalaried status under the federal regulations, alleging that they are subject to discipline by pay deductions, including deductions for infractions unrelated to major safety rules; that they are subject to reduced pay when absent from work to appear as witnesses in court cases; and that in certain situations they are subject to reduced pay for absences caused by military service. These allegations, if proved, would defeat the exemptions claimed by the City,[9] unless the alleged deductions were inadvertent, in which case the City need only reimburse the affected employees and promise to comply with regulations in the future in order to continue to claim the exemption.[10]

The parties do not dispute that each Plaintiff Employee receives compensation established on an annual basis, distributed through bi-weekly paychecks in amounts of not less than $250.00 per week. The

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instruction and study and he customarily and regularly exercises discretion and independent judgment. *Id.* at Section 541.3(e).

[9] *See* Footnote 3.

[10] 29 C.F.R. Section 541.118(a)(6) (1992). *See also* Footnote 3, *supra*.

Employees also earn compensatory time, known as "Comp Time," for hours worked in excess of forty hours per week. Comp Time enables an employee to take time off from work, with pay, during times he or she would otherwise be required to work; however, this additional compensation is not considered part of an employee's salary.

The City maintains written policies, governing the use of leave time accumulated by its employees, which have been revised as part of the City's attempts to conform its employment practices with the requirements of the FLSA. Of these policies, the provisions of Administrative Regulation 6-18 are in controversy. This Regulation allows exempt employees to be absent from work for less than one day, for personal reasons, but requires the employees to use accumulated leave time for this purpose. However, if an individual possesses no accumulated leave time, his predetermined salary would not be reduced as a result of an absence of this nature.

Until recently, Administrative Regulation 6-18 also provided that employees would be subject to deductions from salary for absences or suspensions imposed by the City as disciplinary action. However, on August 25, 1992, effective retroactively to March 12, 1989, the City amended Regulation 6-18 to provide that FLSA-exempt employees may not be removed from paid status for disciplinary reasons, except for violations of safety rules of major significance. The new Regulation allows the City to reduce an employee's annual leave as a form of discipline.

While the City admits that under the old Regulation 6-18 it did, in fact, reduce the pay of certain exempt employees as part of disciplinary action not related to significant safety violations, none of the Employees in this action has demonstrated that he or she is one of those individuals. Furthermore, the City has reviewed its employee records in an attempt to identify the individuals for whom such deductions were made, and has issued reimbursement checks as well as an announcement that anyone entitled to such a reimbursement should contact the Personnel Office. None of the Plaintiff Employees has shown any example of an instance where any employee was entitled to, but denied, such reimbursement.

By completing the revision of the disputed portions of Administrative Regulation 6-18, and by taking steps to notify City employees that reimbursement may be obtained for any previous improper deductions related to disciplinary action, the City has demonstrated current compliance with the federal FLSA regulations as well as its intent to comply in the future. These same actions, considered in light of the history behind these proceedings, demonstrate to the satisfaction of this Court that the City has properly taken action within the "window of correction" afforded by the federal regulations.[11]

The City's regulations provide three weeks of paid military leave to its employees, and none of the Employees in this litigation has presented evidence to

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[11] *See Harkins v. City of Chesapeake*, No. 88-25-N (E.D. Va., Dec. 2, 1988) (*cited in Firefighters Local 2141 v. Alexandria*, 720 F.Supp. 1230 (E.D. Va. 1989), *aff'd* 912 F.2d 463 (4th Cir. 1990)).

show that this benefit has been withheld. City regulations also state that no employee will lose pay when serving as a jury member, when summoned to testify at proceedings related to the employee's services with the City, or when he is to appear in a criminal trial either as a victim or a witness. No evidence suggests that the City has disregarded this written policy.

With respect to the Plaintiff Employees' claims that they are subject to reduced pay when absent to appear as witnesses in court proceedings, the evidence adduced at trial fails to support the Employees' position. Douglas Fertig, the City's Director of Personnel Services, did testify that an employee must use personal leave to attend matters of purely private litigation. While neither the federal nor any City regulations address the situation of an employee's absence to attend to matters relating to private personal litigation, the current federal regulations permit the City to require the use of personal leave time for this purpose. *See* 29 C.F.R. Section 541.5d(a) (1992).[12] Prior to the 1991 enactment of Section 541.5d(a), this Court had ruled that an employee taking time off for personal litigation is considered to be attending to personal matters. *Shockley v. City of Newport News*, No. 90-377-NN (E.D. Va. Dec. 18, 1991).[13] In light of the

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[12] This regulation provides that, without jeopardizing the exempt-status of a job classification, public employers may reduce the accrued personal leave of an exempt employee when that employee is absent for periods of less than a day, and, if no such leave is available, the employer may make appropriate salary deductions.

[13] Plaintiff Employees' reliance on *Shockley* is misplaced. That decision was made without the benefit of 29 C.F.R. Section

provisions of Section 541.5d(a), it follows that the City may require a salaried employee to use personal leave to attend to personal litigation without losing the benefit of its exemptions.

For the reasons stated above, the Court finds that all of the Employees in this action are salaried employees. Having determined the "Salary Basis" requirement satisfied with respect to all the Plaintiff Employees, we must next examine the duties and responsibilities of each.

THE "PRIMARY DUTIES" TEST

At trial, certain specified job classifications were disputed by the City and the Employees with respect to eligibility for exempt status on the basis of job functions. The City has claimed three straightforward FLSA exemptions and one combined Administrative/Executive exemption for the various job classifications in dispute.

A. The Executive Exemption

The City claims that the Employees holding the positions of Superintendent of Parks & Facilities Maintenance[14],

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541.5d(a), effective September 6, 1991. Apparently the *Shockley* Plaintiffs filed their claim prior to that date, and that court held that the regulation was not intended to be applied retroactively.

[14] The parties have stipulated that the determination of the exempt status of Plaintiff Lazich, who holds the position of Superintendent of Parks and Facilities Maintenance, will be dispositive of the exempt status of Plaintiff Peregoy's job classification, Assistant Superintendent of Solid Waste.

Employment Training Supervisor[15], Automotive Parts Manager, and Eligibility Supervisor qualify for the Executive exemption to the overtime provisions of the FLSA. In order to demonstrate the executive exemption for any of these jobs, the City must show that these Employees have management as their primary duties.[16] To meet this burden, the City must demonstrate that over half the time spent at work by each Employee is devoted to management of a department or subdivision of the City, and that the work includes the direction of two or more employees therein *or* that the managerial duties performed by the Employee are of special significance.[17]

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[15] Plaintiff Employees stipulated that the duties performed by the Employment Training Supervisor would qualify this job classification for exemption if the Salary Basis Test were met. Since the Court has found all Plaintiffs to be salaried employees, no further analysis is needed for this job classification.

[16] The regulations list examples of work exemplifying "Management." The examples include interviewing, selecting and training employees; directing work; apportioning work among employees; handling complaints and grievances; selecting tools to be used; and providing for safety. *See* 29 C.F.R. Section 541.102(b) (1992).

[17] *Id.* at Section 541.103. Among the factors to be considered in determining whether duties are of special significance are: (1) the relative importance of the managerial duties as compared with other types of duties, (2) the frequency with which the employee exercises discretionary powers, (3) the employee's relative freedom from supervision, and (4) the relationship between the employee's salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor. *Id.*

1. Superintendent Park & Facilities Maintenance

Plaintiffs Michael Lazich and Frederick A. Hicks are Superintendents of Parks & Facilities Maintenance, a subdivision of the City's Recreation Department. Parks & Facilities Maintenance is divided into two Districts. Hicks is the Superintendent of District 1 and Lazich is the Superintendent of District 2. In addition to the testimony of Lazich and Hicks, the court has considered testimony from Moses Simmons, Deputy Director of Recreation & Parks & Cultural Activities for the City.

It is apparent that the job functions performed by these Superintendents include supervisory duties, but in these positions, supervising, while normally an important aspect of management, is not the equivalent of "management" as contemplated by the federal regulations. The duties of this Superintendent position include general supervision of facilities maintenance operations and construction activities. Two work crews, consisting of approximately five employees and a supervisor, are assigned to each District, and the Superintendents assign work to the crews and establish priorities for particular tasks. Actual work is performed under the supervision of Work Crew Supervisors.

Superintendents may interview potential employees and make hiring recommendations, but according to Witness Simmons, Lazich, at least, is not a regular participant on the interview panels which fill vacancies. While the Superintendents may institute discipline of an employee or make recommendations for disciplinary action, Simmons testified that Lazich and Hicks do not have independent authority to suspend subordinates from work

without pay. The Superintendents rate the work performance of the Work Crew supervisors and review performance evaluations of the employees in each of their districts.

The evidence reveals that the Superintendents also spend substantial time doing non-exempt work of the same general type done by non-exempt employees. Witness Simmons testified that Plaintiff Lazich spends most of his time out in the field, occasionally operating machinery, and Lazich testified that he occasionally assists the work crews when there is a shortage of workers. Plaintiff Hicks testified that eighty percent of his work day is spent checking park sites, making field repairs, and checking for complaints. Only twenty percent of Hicks' work day consists of office work such as recording hours worked by his Work Crew and making up work schedules.

Even though these Superintendents direct and apportion work among subordinates and handle complaints, the Court finds that their primary duties do not consist of management, as defined by the labor regulations. Consequently, the City may not claim FLSA exempt status for the position of Superintendent of Parks & Facilities Maintenance.

2. Auto Parts Manager

The Plaintiff Employees allege that Plaintiff Thomas Hammitte, who works as the Auto Parts Manager in the City's General Services Department, is a working supervisor and not an exempt employee, and that therefore this job classification should not be exempt from the overtime

provisions of the FLSA. The court agrees with the Employees' characterization of this position.

Paul D. Schott is the Director of the City's General Services Department, which contains three divisions: Communications, Motor Equipment Division and Property Maintenance. The Motor Equipment Division is further divided into three separate sections: Administrative, Parts, and Service, all three divisions supervised by James Stott, Division Chief for Motor Equipment. The Parts Section in which Plaintiff Hammitte is employed purchases, tracks, stores and distributes all parts and equipment for the maintenance, upkeep and operation of the City's fleet of vehicles.

Just as the Superintendent of Parks and Facilities Maintenance positions analyzed above, the responsibilities of an Auto Parts Manager include supervisory work such as scheduling and handling complaints, and as previously stated, this Court does not find these supervisory responsibilities to be the equivalent of "management" as defined by the federal regulations. Hammitte spends over half his time on such non-managerial duties as taking orders, checking in deliveries, taking inventory, pricing materials and making deliveries. Although he is in charge of day-to-day operations for his section, and he evaluates, trains and disciplines employees, he spends more than half his time at work performing the same tasks as the employees he supervises.

The Service Manager of the Motor Equipment Division, an employee by the name of John Franke, performs duties similar to Hammitte's and receives a salary

approximately equivalent to Hammitte's. Hammitte testified that Franke, whose position is classified by the City as non-exempt from overtime pay requirements, receives compensation of approximately $40,000 per year and is responsible for hiring, training and firing the mechanics in his section. Similarly, Hammitte earns compensation of approximately $41,000 and supervises four employees who earn $18,000-$22,000 per year. The court finds no basis for the difference in status between Hammitte's job and that of the Service Manager, and concludes that the position of Auto Parts Manager is not exempt from the overtime requirements of the FLSA.

3. Eligibility Supervisor

Plaintiff Jo J. Butler is employed as an Eligibility Supervisor in the Eligibility Division of the City's Department of Social Services. The Plaintiff Employees contend that, because an Eligibility Supervisor has no independent managerial control of a separate customarily recognized unit of the City, this position should not be exempt from receiving overtime compensation.

The federal regulations broadly define what constitutes "a recognized department or subdivision" of an employer. The requirement may be satisfied by "a unit with permanent status and function,"[18] and does not require a formal department with a separate budget, contrary to the argument advanced by Plaintiffs. Butler is, in fact, charged with supervision of a permanently assigned unit. The Eligibility Division of the Department of Social

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[18] *See* 29 C.F.R. Section 541.104 (1992).

Services has the function of determining and reviewing whether citizens of the City are eligible for public assistance. The Eligibility Division is further divided into separate sections; Plaintiff Butler works as a supervisor in the Review Section, which itself consists of two Review Units. Each Review Unit has its own supervisor and reviews eligibility for specific public assistance programs.

Butler not only works in a permanently assigned unit, her primary duties consist of the type of management activities contemplated within the federal labor regulations' definition of a *bona fide* executive employee. Butler trains new employees, assigns work to her staff, schedules work hours and approves leave requests, and evaluates the work performance of employees. She participates in the interview process and is also responsible for discipline, having the discretion to issue reprimands and the ability to recommend more severe action. Over fifty percent of Butler's time is devoted to these described activities.

Having found that Butler's job responsibilities meet the requirements of the Primary Duties Test for a *bona fide* executive employee, the Court concludes that the City may claim an Executive Exemption from the overtime requirements of the FLSA for the job classification of Eligibility Supervisor.

B. The Administrative Exemption

The City claims an Administrative Exemption for the following job positions held by Plaintiff Employees: Urban Planner II, Construction Field Representative,

Information Systems Project Leader[19] and Impounding Officer[20]. In order to qualify for this exemption, the major portion of the work performed by a *bona fide* administrative employee must consist of office or non-manual work directly related to management policies or general business operations, and such duties must require the regular exercise of discretion and independent judgment.[21] The regulations attempt to distinguish the administrative operations of an employer from mere production work. To qualify for this exemption, employees need not operate at a level where they formulate management policies; it is sufficient that their work affects policy or that they are responsible for executing or carrying out policy.[22]

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[19] Plaintiffs stipulated that the duties performed by an Information Systems Project Leader would qualify that job classification for exemption if the Salary Basis Test were satisfied. Since the Court has found that all Plaintiffs meet the Salary Basis Test, no further analysis is required for this position.

[20] Plaintiffs stipulated that the duties performed by an Impounding Officer would qualify that job classification for exemption if the Salary Basis requirement were met. As a result of the findings in Section II of this opinion, no further analysis is required for this job classification.

[21] *See* 29 C.F.R. Sections 541.2 and 541.206(a) and (b) (1992).

[22] *Id.* at Section 541.205(c). *See also Firefighters Local 2141 v. Alexandria*, 720 F.Supp. 1230, 1233-34 (E.D. Va. 1989), *aff'd* 912 F.2d 463 (4th Cir. 1990). Examples of administrative-type workers cited in the regulations include credit managers, safety directors, claim agents, analysts, etc.

1. Urban Planner II

Plaintiff Employees allege that the work performed by an Urban Planner II relates directly to production functions and not to the internal management of that worker's department. Plaintiffs further allege that an Urban Planner II does not exercise the level of discretion necessary to be classified as an exempt administrative employee.

Sheldon L. Lynn, the City's Director of Planning & Community Development, and the person responsible for the entire operation of the Department of Planning & Community Development, described the organization of his Department. Planning and Community Development provides analysis, information and recommendations to the City Council, City Manager, and City Planning Commission. Lynn stated that the Department is organized into three divisions: Zoning, Special Projects and Comprehensive Planning, and that there are employees classified as Urban Planner II within each division.

The evidence at trial demonstrates that the primary duties of a Planner II consist of activities directly related to formulation of City policies and decisions. Plaintiff Ronald Yake testified that he works as an Urban Planner II in the Special Projects Division,[23] and that his responsibilities include reviewing applications for rezonings and special use permits, and, when directed, performing

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[23] The parties have stipulated that the determination as to whether an Urban Planner II qualifies for FLSA exempt status is to be based on Ronald Yake's performance of the duties of an Urban Planner II. Plaintiffs Ronald Yake, Ron Johnson and Van Slaymaker are each employed by the City as Urban Planners II.

special studies pertaining to the zoning ordinances or zoning regulations. He estimated that he spends approximately eighty-five percent of his time working on zoning code text amendments, rezoning applications and residential cluster applications, and that a very low percentage of his total work time is spent going to City Council meetings and making reports.

Sheldon Lynn also described the duties of a Planner II in his testimony, stating that within the Special Projects Division, an Urban Planner II handles applications for rezoning and cluster development as well as proposed amendments to the zoning code, reviewing such applications and proposals and independently preparing analyses and reports for the Director's review. The Planner's reports are ultimately utilized in preparing recommendations to the Planning Commission, which, in turn, makes recommendations to the City Council.

Thus the position of Urban Planner II has, as its primary function, the duty of performing analyses for the purpose of advising management, in this case the Director of the Department himself. The Planner's findings and analyses are utilized in providing advice to the City Council, and may ultimately result in a change or implementation of policy.

In support of his contention that the Planner II position does not entail a level of discretion sufficient to qualify it for an Administrative Exemption, Yake stated that his duties include no supervision and that all his written recommendations require approval from his Department Director as to content as well as form. It is true that the Director of Yake's Department has final

authority to approve or disapprove Yake's recommendations; however, according to the federal regulations, recommendations for action may themselves suffice as decisions requiring an exercise of discretion and independent judgment.[24] In addition, Yake's claim that he has no independent exercise of discretion and cannot speak for his Department or the City is not a persuasive factor in the Court's analysis of this classification. The very essence of Yake's duties is the provision of recommendations for action and, accordingly, the Court finds that the City has properly claimed an Administrative Exemption for the job classification Urban Planner II.

2. Construction Field Representative

Plaintiff Anthony Hinz is employed in the City's General Services Department as a Construction Field Representative. Just as with the Urban Planner II position, Plaintiff Employees contend that the City's Construction Field Representative should be classified as non-exempt for receipt of overtime pay, alleging that this

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[24] The regulations provide:

> The term "discretion and independent judgment" as used in the Regulations . . . does not necessarily imply that the decisions made by the employee must have a finality that goes with unlimited authority in a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for actions rather than the actual taking of action.

29 C.F.R. Section 541.207(e) (1992).

Employee lacks discretion in the performance of his duties.

The federal regulations recognize that planning, negotiating contracts, representing the employer, and business control are all administrative operations. *See* 29 C.F.R. Section 541.205(b) (1992). These functions accurately describe the duties performed by the City's Construction Field Representative. Plaintiff Hinz testified that he inspects and supervises construction projects, administers contracts to ensure construction in compliance with contracts, plans and specifications, and that he ensures compliance with City Code regulations and industry standards. He testified that he carries out his duties with little direct supervision.

Hinz not only acts as the City's representative in communications with the contractors, he also negotiates change orders to contracts and inspects projects to assure that work is performed to the City's satisfaction. He has supervised City construction projects ranging from several thousand to $1.5 million dollars. While Hinz does not always have final authority to commit the City to specific positions on particular contracts, throughout the course of a project his recommendations are given particular weight by the Director of the Department of General Services. As discussed in connection with the Planner II job classifications, the responsibility of making recommendations for action may itself require the exercise of significant discretion and independent judgment.

The duties of the Construction Field Representative constitute the type of administrative work contemplated by FLSA regulations as being directly related to the City's

management policies or general business operations. This Court finds that the City's job classification of Construction Field Representative merits an Administrative Exemption from the overtime requirements of the FLSA.

C. Professional Exemption: Social Worker I and II

Plaintiff Matthew Thomas is employed as a Social Worker I in the City's Department of Human Services. Plaintiffs Margaret Dhillon, David McCreedy, Bette Smith, Colby Hatch, and Joann Gray are each employed as a Social Worker II at the City's Department of Human Services. The City claims a Professional Exemption from the FLSA overtime requirements for the job classifications of Social Worker I and Social Worker II. To prevail on its claim for these positions, the City must show that these Employees spend the major portion of their time performing work which requires advanced knowledge in a field of science or learning and the consistent exercise of discretion and judgment.[25]

The City has met its burden to demonstrate that personnel employed as Social Worker I and Social Worker II spend the majority of their time at work engaged in duties which consistently require the exercise of discretion and independent judgment. There was testimony from Terrence Lee Robinson, the Division Chief for Classification & Compensation in the City's Personnel Department, that each of these Social Workers reports to a supervisor, but he emphasized that the positions also

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[25] *See* 29 C.F.R. Section 541.3 and 541.305(1992).

entail substantial independence. There can be little dispute that the discretion afforded to these employees is substantial; one example among many is the fact that they have the independent authority to remove children from their homes. Each Social Worker carries a large case load, 40-60 cases, and most of their work is done in the field, without immediate supervision.

The daily duties of a Social Worker I include such tasks as providing counseling and therapy to individuals and families, providing social assessments, crisis intervention for evicted, homeless, or other displaced individuals, arranging and monitoring foster care placements, and providing treatment to emotionally disturbed adults and children.

Margaret Dhillon, a Social Worker II, testified that her own unit is called an Intake Unit and that the majority of cases received by a Social Worker II are complaints of child abuse and neglect. She further testified that her unit also handles some foster care and some family service cases. The day-to-day duties of a Social Worker II generally include the following: preparation of social histories, psychosocial diagnoses and treatment plans; providing therapy to individuals, families and groups; providing crisis intervention; continuous 24 hour on-call service; determining disposition of abuse and neglect complaints; testifying for the Department in civil and criminal court proceedings; emergency removal of children from their homes; training and supervision of foster parents, and responsibility for complex foster care cases which may require termination of parental rights and considerable court involvement.

Aside from indicating the level of discretion attributable to a City Social Worker, the duties described above necessarily require each Social Worker to have advanced knowledge and training in the social sciences. Plaintiff Dhillon testified extensively about the various types of knowledge essential to the work performed by the City's social workers, and stated that such knowledge is customarily acquired by these workers through a prolonged course of university level study or its equivalent. Dhillon testified that her work as a Social Worker II requires knowledge of normal and abnormal psychology, child development, mental retardation, social problems, therapeutic treatment techniques, alcoholism, child delinquency, drug addiction, theories of human behavior, knowledge of group behavior and knowledge of literature in the field of social work.

The federal regulations define the term "professional" to include individuals engaged in professions having a recognized status and in which professional knowledge is normally acquired through a course of prolonged study, referring to such pursuits as "learned professions."[26] According to the FLSA regulations,

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[26] *See* 29 C.F.R. Section 541.301(1992). A learned profession requires advanced knowledge in a field of learning customarily acquired by a prolonged course of specialized intellectual instruction and study. *Id.* Section 541.302(a). This "field of study" requirement distinguishes a profession from an occupation which mereiy requires a "general academic education coupled with a subsequent apprenticeship or from training in the performance of routine mental, manual or physical processes," *Id.* and also "serves to distinguish the professions from the mechanical arts." *Id.* at Section 541.302(c). The requirement that the knowledge be of an advanced type

possession of an advanced educational degree is the best evidence that an employee does in fact meet the educational and training requirements contemplated by this Exemption.[27] An advanced degree, however, may not be the only acceptable evidence of the requisite learning and training for this job classification.

Since August of 1990, the City has required that any person newly hired as a Social Worker I, or newly hired or promoted to Social Worker II, must possess a baccalaureate degree in the field of Human Services, or a baccalaureate degree in any field plus a minimum of two years of experience in an area related to Human Services. With the exception of one Plaintiff Employee, all the individuals currently employed by the City as Social Worker I or II possess the requisite educational background. The single employee who does not meet this educational requirement possesses extensive experience as a social worker with the City, and in this court's opinion, that Employee's relevant and valuable experience is the equivalent of the educational backgrounds of the other Social Workers.

There is an ongoing debate about whether social work qualifies as a learned profession. Suzanne Chis, Director of Social Services for the City, and who manages

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means that generally it is knowledge which cannot be obtained at the high school level. *Id.* at Section 541.302(b).

[27] "The typical symbol of the professional training and the best prima facie evidence of its possession is, of course, the appropriate academic degree, and in these professions an advanced academic degree is a standard (if not universal) prerequisite." *Id.* at Section 541.302(e)(1).

the public assistance programs, testified there are professional associations for social workers, which might indicate a certain recognized status, but she also testified that there are no national licensing procedures. Colleges and universities offer undergraduate and graduate degrees in social work, a fact which would support the proposition that social work is a recognized field of learning; but this, alone, is insufficient evidence that social work is a profession contemplated by the federal regulations as meriting an exemption from overtime pay. However, when considered in light of the proven qualifications and training possessed by each of the Plaintiff Employees, the Court finds that the duties performed by the Social Workers I and II consist of work requiring advanced knowledge in a field of science and learning, of a type normally acquired through a course of prolonged study, and that the job classifications of Social Worker I and Social Worker II have been properly classified by the City as exempt from the overtime requirements of the FLSA.

D. Executive/Administrative Combination Exemption

The City claims a combination Executive/Administrative exemption for its Supervisory Secretary III position. The federal regulations permit an employee to be exempted from the overtime requirements of the FLSA if they qualify for a "combination exemption" such as the one asserted by the City for this job classification.[28] At

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[28] A "combination exemption" combines the tests for executive, administrative, and professional employees into a

trial, Plaintiff Employees stipulated that the duties performed by Supervisory Secretary III employees would qualify that position for FLSA-exempt status should it be found to meet the Salary Basis Test. Since the Court has found that all the Plaintiff Employees are salaried, the Court further finds that the Supervisory Secretary III classification qualifies for a combination Executive/ Administrative exemption from the overtime requirements of the FLSA.

III. SUMMARY

The City has met its burden to demonstrate that, with respect to the job classifications of Employment Training Supervisor, Eligibility Supervisor, Urban Planner II, Construction Field Representative, Supervisory Secretary III, Information Systems Project Leader, Impounding Officer, Social Worker I and Social Worker II, its personnel policies and procedures do, in fact, comply with federal regulations implementing the Fair Labor Standards Act. Having demonstrated that each of those job classifications satisfies the requirements for an executive, administrative, or professional exemption from the requirements of the FLSA, the City need not pay overtime to the Employees working in these positions.

The Plaintiff Employees working for the City as Superintendents of Parks & Facilities Maintenance and Automotive Parts Manager have been improperly classified by the City as exempt from the overtime provisions of the Fair Labor Standards Act. The Court finds that

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special set of requirements. *See* 29 C.F.R. Section 541.600 (1992).

their primary duties do not consist of "management" as required by the FLSA regulations. Accordingly, the Plaintiff Employees working in these positions are entitled to receive overtime compensation.

The Court will issue an order entering judgment in favor of the City of Alexandria with respect to all disputed job classifications except Superintendent of Parks & Facilities Maintenance, Auto Parts Manager, and Assistant Superintendent of Solid Waste. Additionally, the Court will issue an appropriate order to schedule further proceedings on damage issues relating to the Plaintiff Employees holding the latter three positions.

/s/ W. Curtis Sewell
W. Curtis Sewell
U. S. Magistrate Judge

March 31, 1993
Alexandria, Virginia

* * *

[p. 122] Q DYFS did not exist prior to 1990, correct?

A Not as a separate agency, no. We were part of Department of Corrections.

* * *

Q Now, based upon your examination of those personnel files and the PMIS system, did you determine how many probation counselors who had been hired since July 1, 1989 had a college degree, and if so, how many of those had a college degree in a related field?

A All of them had a college degree with one exception that I wasn't able to determine. This particular employee listed a certificate from an institution in Africa which I'm not familiar with. They did list it as a degree, I believe it was in education psychology, but they called it a certificate.

Q Now, did you perform a review of all the [p. 123] records you've already described to determine the experience that all the plaintiffs had prior to becoming employed by the Department of Youth and Family Services, or the Department of Corrections as it preceded the department?

A Yes.

Q And based on your analysis, what did you find insofar as experience of the plaintiffs, whether it was related or not?

A I found that all plaintiffs have related experience with one exception.

Q And what was that one exception?

A The application was somewhat incomplete. I reviewed a resume' and did see one indication of some experience working with youth, but it was not explained to the point that I could determine the extent of that experience. I was not able to check it out with the court service director, because he is since deceased.

Q Now, when you're saying related experience, would you please tell the court what you mean by related experience?

A I'm talking about positions such as having been a social worker, having been a mental health worker, a mental health therapist, a counselor.

* * *

[p. 148] Q Do all of your people possess the credentials necessary to be qualified to go to work in the city's social services department?

A Yes.

Q Ms. Brooks, are you familiar with the kind of stuff that a social services worker has to know in order to be able to do his or her job as a social services worker?

A Yes. They have to know the principles of family counseling and dealing with troubled youth in families. They have to know about substance abuse. They have to know about special education, corrections, control, abnormal psychology and just anything related to those areas. And they have to know about treatment modalities and resources in the [p. 149] community.

Q Is that basically the same stuff your people have to know to do their job?

A Yes.

Q Are you familiar with anything the social services workers need to know that one doesn't have to know to be a probation counselor in Alexandria?

A I'm really not familiar with anything that comes under that category.

Q Are the two positions functionally substantially similar or equal?

A Yes, I believe so.

MR. DAVIS: I don't have any other questions, Your Honor.

THE COURT: Cross-examine?

CROSS-EXAMINATION BY MR. LEIBIG:

Q Did you just say that you believe that the position of a juvenile probation officer and a social worker, you are referring to a social worker two or a social worker one, are identical?

A I'm referring to both positions.

[p. 150] Q So you're saying that a juvenile probation officer – I want to make sure that this is clear. A juvenile probation officer's functions and duties and background and everything is the same as a social worker two employed by the Department of Human Services in Alexandria?

A A social worker two has more experience, but that's the only difference.

Q But their work's the same?

A They have essentially the same functions and knowledge and skills, yes.

* * *

[p. 34] Q Are you personally familiar at all with how individual court service units approach the issue of discipline with their employees?

A No.

Q And in fact you don't know, do you, whether at any individual court service unit the probation officers are treated as subject to being disciplined by being put out on the street without pay?

A No, I don't know.

Q You just don't know any of those things, do you?

A No. The state has a broad policy with [p. 35] regard to discipline, and it's up to each agency to implement those broad policy guidelines.

* * *

Opinion Letter No. 1344 (WH-292). October 8, 1974.

Fair Labor Standards Act

We regret the delay in replying to your letters of June 27, and July 3, 1974, concerning the exempt status under the Fair Labor Standards Act of various classes of employees of. . . . County.

The descriptions of the educational requirements and the duties and responsibilities of Public Defender Investigators II, and III submitted with your letter of June 27, 1974, would meet the conditions for exemption as administrative employees under Regulations, Part 541.2, where such employees are paid in accordance with the salary tests specified in the Regulations (copy enclosed). While the salaries outlined in your letter meet the salary tests contained in the current regulations, your attention is directed to the enclosed excerpt from the Federal Register of August 16, 1974, which proposes an interim increase in the salary rates for administrative employees to $160 a week and to $300 a week for the special high salary provisions.

With regard to the Deputy Probation Officers II and III listed in your letter of July 3, 1974, you are advised that based on the job descriptions submitted, they would meet the conditions for exemption as an administrative employee under Regulations Part 541.2.

It should be pointed out, however, that it is questionable whether Estate Investigators and Public Defender Investigators I whose duties are closely supervised by a superior would meet the independent discretion and judgment test or would spend at least 80% of their time

worked in duties at the level contemplated by the exemption.

With regard to your concern over the provisions of section 7(k) of the Act, you are advised that this section only provides an alternative method of paying premium overtime compensation for certain employees in fire protection activities or law enforcement activities – it does not negate the use of the exemption in Section 13(a)(1) for employees who meet the duty, responsibility and salary tests contained in Regulations Part 541.

At the present time regulations defining the term "law enforcement personnel" are being drafted. However, we are not prepared to state that probation officers would come within the definition of this term.